(14)

No. 95-1918-CFX Title: Arkansas, Petitioner
v.
Farm Credit Services of Central Arkansas, et al.

Docketed: May 28, 1996 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	May 22 1996	Petition for writ of certiorari filed. (Response due June 27, 1996)
	Jun 21 1996	Brief amici curiae of Ohio, et al. filed.
	Jun 27 1996	Brief of respondents Farm Credit Services of Central Arkansas, et al. in opposition filed.
	Jul 10 1996	DISTRIBUTED. September 30, 1996
	Oct 7 1996	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Dec 30 1996	REDISTRIBUTED. January 17, 1997
	Dec 30 1996	Brief amicus curiae of United States filed.
	Jan 10 1997	Supplemental brief of respondents filed.
	Jan 17 1997	Petition GRANTED. In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: "Should the case have been dismissed by the district court for lack of subject matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. Section 1341?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 28, 1997. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 28, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 9, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT April 21, 1997. **********
	Feb 18 1997	Record filed.
	Feb 27 1997	Joint appendix filed.
	Feb 27 1997	Brief of petitioner Arkansas filed.
	Feb 27 1997	Brief amicus curiae of United States filed.
	Feb 28 1997	Brief amici curiae of Ohio, et al. filed.
	Feb 28 1997	Brief amicus curiae of Multistate Tax Commission filed.
	Feb 28 1997	Brief amici curiae of American Bankers Association, et al. filed.
	Feb 28 1997	CIRCULATED.
	Mar 18 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 27 1997	Brief of respondents Farm Credit Services of Central Arkansas, et al. filed.
	Mar 31 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 8 1997	Reply brief of petitioner Arkansas filed.
	Apr 21 1997	ARGUED.

1 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF ARKANSAS ..... *Petitioner*

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45pp

QUESTION PRESENTED FOR REVIEW

DOES THE ~~DOCTRI~~NE OF INTERGOVERNMENTAL TAX IMMUNITY PROHIBIT A STATE FROM TAXING INCOME AND SALES OF PRODUCTION CREDIT ASSOCIATIONS, STATUTORILY DESIGNATED AS "FEDERAL INSTRUMENTALITIES," WHEN 12 U.S.C. § 2077 SPECIFICALLY ADDRESSES THE ISSUE OF TAXATION OF PRODUCTION CREDIT ASSOCIATIONS?

LIST OF PARTIES

The parties to this proceeding are as follows: The Petitioner is the State of Arkansas. The Respondents are four Production Credit Associations chartered by the Farm Credit Association, including Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Association.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF ARKANSAS ..... *Petitioner*

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 76 F.3d 961 (1996), and is printed in its entirety at Appendix A hereto. The Order of the United States District Court of the Eastern District of Arkansas, Western Division, is unreported and is printed in its entirety at Appendix B hereto.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Opinion of the United States Court of Appeals for the Eighth Circuit was delivered on February 23, 1996 (see Appendix A). This Petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . .

STATUTORY PROVISIONS INVOLVED

[Pertinent text is set forth in Appendix C as provided in Rule 14.1(f) of the Rules of the Supreme Court.]

STATEMENT OF THE CASE

Petitioner, the State of Arkansas, through the Department of Finance and Administration, is charged with the duty of administration of state tax law, including the assessment and collection of state tax. Respondents are four Production Credit Associations chartered by the Farm Credit Association who filed an action in the United States District Court for the Eastern District of Arkansas seeking a declaratory judgment that, as federal instrumentalities, they are exempt from state and local taxes, including income tax and gross receipts (sales) tax, and an injunction against the imposition or assessment of such taxes by the State of Arkansas. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and Article Six, Clause Two of the Constitution of the United States.

The District Court agreed with Respondents that because Respondents are federal instrumentalities, there arises an implied immunity from state and local taxation, that any waiver from such immunity must be express, and that Petitioners had not proven that such a waiver existed, and entered an Order on March 7, 1995, granting Respondents' Motion for Summary Judgment. Petitioner appealed this decision to the United States Court of Appeals for the Eighth Circuit.

On February 23, 1996, the Court of Appeals for the Eighth Circuit affirmed the decision of the District Court, over the dissent of Judge Loken.

ARGUMENT

(REASONS FOR ALLOWANCE OF THE WRIT)

A CONFLICT EXISTS BETWEEN THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THIS CASE AND DECISIONS OF THIS COURT REGARDING THE APPLICATION OF THE CONSTITUTIONAL DOCTRINE OF IMPLIED IMMUNITY OF FEDERAL INSTRUMENTALITIES FROM STATE TAXATION WHERE THE ISSUE OF IMMUNITY FROM STATE TAXATION MAY BE DECIDED BY STATUTORY INTERPRETATION OF 12 U.S.C. § 2077.

The Petitioners submit that there is a conflict between the decision of the Court of Appeals for the Eighth Circuit and decisions of this Court regarding the application of the Constitutional doctrine of implied immunity of federal instrumentalities from state taxation where the issue of immunity from state taxation may be decided by statutory interpretation of 12 U.S.C. § 2077. In its decision, the Eighth Circuit Court of Appeals stated:

> [T]he current version of § 2077 acknowledges that because of the Supremacy Clause express exemption of the PCAs from state taxation in the earlier statutes constituted unnecessary surplus language. Where Congress is silent, the tax immunity of federal instrumentalities from state taxation is implied. (citations omitted) There is no provision in any statute, including 12 U.S.C. § 2077, which indicates an intent on the part of Congress to waive the PCAs' tax immunity as federal instrumentalities. Therefore, the PCAs, as instrumentalities of the United States, are immune to state taxation, and we affirm the district court's judgment to that effect. (P. App. A-6)

The following discussion will show that this Court should grant this petition in order to resolve this conflict in favor of the Petitioners.

The first step of the Court of Appeals' analysis is based upon the premise that, as federal instrumentalities, PCAs "implicitly" merit federal immunity from state taxation. As authority for this finding, the Court of Appeals relies upon this Court's decisions beginning with *McCulloch v. State of Maryland*, 4 Wheat 316 (1819); *Federal Land Bank of Wichita v. Bd. of County Comm'rs*, 368 U.S. 146, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961); and *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982).

Even though the general constitutional principle of intergovernmental tax immunity of federal instrumentalities, as first articulated in *McCulloch*, renders the United States exempt from state and local taxation, *Feaeral Land Bank of Wichita v. Bd. of County Comm'rs*, upon which the Court of Appeals relies in part, advocates deference to Congressional authority rather than judicially implied constitutional immunity.[1]

In 1982, in *New Mexico*, 455 U.S. 720 (1982), the Court reflected upon the "confusing nature of our precedents" regarding the immunity doctrine and concluded that "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.*, at 735.

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[1]In *Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146 (1961), the Court considered the statutory exemption from taxation granted to Federal Land Banks and held that the statute conferred express immunity from state personal property tax, making it unnecessary to consider whether the doctrine of implied immunity applied.

Twenty years earlier, in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the Court examined not only the express statutory exemption from tax granted to Federal Land Banks, but also the legislative history of the statute, in order to reach its decision.

The Court of Appeals found *New Mexico* inapplicable to "Congressionally created federal instrumentalities like PCAs," apparently implying that the *New Mexico* analysis applies only to entities which have not been declared to be federal instrumentalities. (P. App. A-6) While the factual basis for the *New Mexico* decision involves federal contractors who are not designated by statute as "federal instrumentalities," the analysis is not inapplicable to an entity such as a PCA.

PCAs were created by the Farm Credit Act of 1933, Pub. L. No. 73-98; 48 Stat. 257 (1933), which established the Farm Credit Administration, an independent agency in the executive branch of the Government, comprised of the thirteen-member Federal Farm Credit Board who hired a full-time Governor and other officers and employees, with responsibility to oversee the banks and associations comprising the system. This legislation incorporated the provisions regarding the associations created in 1916 and 1923, including Federal land banks, and also created Banks for Cooperatives. The PCA's purpose was to obtain short- and intermediate-term loans from Federal intermediate credit banks in order to facilitate the delivery of credit services to farmers and ranchers. The Banks for Cooperatives were to make loans and provide credit services to agricultural, aquatic, and rural utility cooperatives. At their inception, the stock in PCAs was owned by both the government and by farmers and ranchers.

The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), the purpose of which, according to the legislative history, was to rewrite, modernize, and streamline the statutory authority of the Farm Credit System, repealed most of the existing statutory authority for the Farm Credit System in the rewriting process. The resulting Farm Credit System consisted of twelve Farm Credit Districts, in each of which was located three System banks: a Federal land bank, a Federal intermediate credit bank, and a bank for cooperatives, as well as from 21 to 60 PCAs. Prior to the 1971 Act, all of the Government capital in all of the 441 PCAs had been retired, and the PCAs were completely owned by their members. *See*

generally, H. R. Rep. No. 593, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 2091.

In the early 1980s the depressed agricultural economy resulted in financial stress on the Farm Credit System. The Committee on Agriculture began consideration of amendments to the Farm Credit System legislation to address these problems. One of the major purposes of the amendments was to make the Farm Credit Administration an arm's-length regulator of the System and to remove the day-to-day participation in management. *See generally*, H. R. Rep. No. 425, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587.

The Farm Credit Act and amendments confirm the separation between Farm Credit Systems institutions, particularly PCAs, and the federal government. Each PCA is organized and owned by the borrowers who are farmers and ranchers, not the government, and is controlled by an independent board of directors elected by the members. 12 U.S.C. §§ 2071, 2072, 2073. Although PCAs are subject to regulation by the Farm Credit Administration, the stated objective of the Farm Credit System is to encourage the participation of farmer- and rancher-borrowers in the management, control, and ownership of a farm credit system, rather than supervising day-to-day System management. 12 U.S.C. §§ 2001, 2002.

The System is a "Government sponsored entity;" however, System entities are not Government owned or controlled. System debt securities are not obligations of, or guaranteed by, the United States or any agency or instrumentality thereof, other than the System banks, one of which a PCA is not. All of the Farm Credit Administration's administrative expenses are paid by the System entities rather than the Government. Farm Credit Administration, 1994 Annual Report (1995).

Various jurisdictions have concluded that PCAs are more like private corporations than federal agencies for various

purposes. *See generally, Hanna v. Federal Land Bank Association of Southern Illinois,* 903 F.2d 1159 (7th Cir. 1990) (federal land bank and production credit associations held private employer without sufficient governmental involvement to constitute federal agencies exempt from jury trial in action by former employee); *Birbeck v. Southern New England Production Credit Association,* 606 F.Supp. 1030 (D.Conn. 1985) (production credit association considered private entity rather than governmental agency for purposes of invoking federal due process clause).

Although the above cited cases address federal instrumentality status of PCAs for purposes other than taxation, they support the proposition that PCAs are entities separate and distinct from the federal government in many respects, and that federal regulation alone is not sufficient to connect a PCA so closely to the Government that it cannot be viewed as a separate entity.

The Internal Revenue Service ruled that a PCA is not an arm of the government for purposes of federal income taxation.[2]

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[2]Rev. Rul. 84-109, 1984-2 C.B. 7 states, in pertinent part:

An organization that is designated as an instrumentality by statute will not be considered an instrumentality for investment credit purposes if it does not act as an arm of the government, because such treatment as an instrumentality would be contrary to Congressional intent for the instrumentality exclusion. . . . PCAs originally served a governmental function, by making loans available regardless of profit potential. In order to facilitate this function the PCAs were made instrumentalities of the United States and were given an exemption from both federal and local taxation. However, some PCAs, such as the one in this case, are now totally controlled by private owners, perform no substantial governmental functions and operate as profit seeking financial institutions in competition with private banks and savings and loans. These PCAs are financially autonomous and are not funded by the federal government. They are not subject to substantial government control. There is no tax exemption for the PCA described in the instant situation. . . . Thus, the description of these PCAs as federal instrumentalities does not reflect their true economic function and status and therefore is not determinative for purposes of section 48(a)(5) of the Code.

Cases decided subsequent to *New Mexico* support the principle originally articulated in that opinion. *South Carolina v. Baker,* 485 U.S. 505 (1988); *United States v. California,* 507 U.S. 746, 113 S.Ct. 1784, 123 L.Ed.2d 528 (1993). In *California State Board of Equalization v. Sierra Summit, Inc.,* 490 U.S. 844 (1989), applying its analysis to a Bankruptcy Trustee, the Court stated, "Although Congress can confer an immunity from state taxation, (citations omitted) we have stated that '[a] court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed'." *Id.,* at 851-52.

In the absence of an express statutory exemption, the Court concluded in *Department of Employment v. United States,* 385 U.S. 355 (1966) that the Red Cross was an instrumentality of the United States for purposes of immunity from state taxation, based, in part, upon its structure and functions and in recognition that the President and the Congress have recognized the "Red Cross' status virtually as an arm of the Government." *Id.,* at 359-360.

Based on the structure and stated objectives of the Farm Credit System and the foregoing cases, production credit associations are not so closely connected to the federal government as to confer upon them immunity from state taxation, and the designation of a PCA as a federal instrumentality does not automatically exempt a PCA from all state taxation.

The second step of the Court of Appeals' analysis is that 12 U.S.C. § 2077 contains no express waiver of exemption from state taxation, and where Congress is silent, the tax immunity of federal instrumentalities is implied, relying on *Graves v. New York,* 306 U.S. 466 (1939).

First, the Court of Appeals' reliance on *Graves* is misplaced,[3] but, more importantly, the Court of Appeals refused to interpret the statute.

12 U.S.C.A. § 2077, titled "Taxation" and codified within "Part A-Production Credit Associations" of Chapter 23-Farm Credit System of Title 12, provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and

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[3]In *Graves v. New York*, 306 U.S. 466 (1939), the Court held that, although as an instrumentality the Home Owners' Loan Corp itself and its bonds are exempt from state taxation, the salary of its employees was not statutorily or constitutionally exempt. The Court clearly indicated that,

> [T]he silence of Congress, when it has authority to speak may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

Id., at 479-480.

> all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Applying the principles of statutory construction to a statute which directly addresses the taxation of PCAs is more appropriate and is in agreement with the practice of this Court to decide issues of statutory interpretation rather than deciding the constitutional question. *Clark v. Jeter*, 486 U.S. 456, 470 (1988).

The Court employed the principle of statutory construction to determine, in *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988), by examination of not only the statutory language but also the legislative history of the applicable statute, that Project Notes were not exempt from estate tax.

In 1933, upon the creation of PCAs, Congress granted them an express exemption from state taxation, including their property and income; however, in the same statute Congress waived that exemption when the Government no longer owned any of the stock in the PCA.[4]

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[4]The statute which addressed the taxation of PCAs, as well as that of several other Farm Credit entities, Farm Credit Act of 1933, Pub. L. No. 73-98, § 63, 48 Stat. 257, 267, read as follows:

> The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. *Such* banks, *associations*,

The Farm Credit Act of 1971 repealed the existing farm credit legislation and rewrote the Farm Credit Act. The existing tax status of PCAs was reenacted under the PCA section of the bill (Sec. 2.17), with little change in the language of the statute other than the removal of the reference to associations other than PCAs. *See generally*, H. R. Rep. No. 593, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2091, 2111. The express exemption from taxation and the waiver of exemption from taxation was preserved. Farm Credit Act of 1971, Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971).

Decisions that occurred during the period following the retirement of all PCA stock held by the Government, while not decided under current law, are indicative of the clear statutory waiver of the exemption. *See generally, Woodland Production Credit Association v. Franchise Tax Board*, 225 CA 2d 293, 37 Cal. Rptr. 231 (1964) (statutory waiver of exemption from taxation of PCAs permits taxation of the corporation itself; thus PCA is not exempt from California franchise tax which is a tax on the income of the corporation); *Columbus Production Credit Association v. Bowers*, 173 Ohio St. 97, 180 N.E.2d 1 (1962), cert. den. 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (production credit association held not exempt from Ohio

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[4] continued

and corporations, *their property, their franchises, capital, reserves, surplus,* and *other funds, and their income, shall be exempt from all taxation* now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired,* or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired. (emphasis added)

franchise tax; exemption from state taxation waived by Congress in provision that exemption will not apply after the stock in the PCA held by the governor has been retired); *Baker Production Credit Association v. State Tax Commission*, 421 P.2d 984 (Ore. 1966) (Each PCA became subject to state taxation when the government ownership of its stock ended).

The Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678, 1705 (1985) amended the section which addressed the taxation of PCAs by "striking out the last two sentences of section 2.17."[5] This amendment was included in Section 205 which "contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration," and which deletes references to the Governor of the Farm Credit Administration, which position was abolished by the amendments. H.R. Rep. No. 425, 99th Cong., 1st Sess. *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587, 2615.

The amendment to the statute thus removed both the express exemption and the express waiver of exemption,

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[5] The sentences, immediately before the amendment striking them, read:

> Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that interest on the obligations of such association shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to Public Debt Act of 1941 (31 U.S.C. 742(a)) and except any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

Pub. L. 92-181, Title II, Part B, § 2.17, 85 Stat. 602.

leaving, with only very minor changes, the current section 2077.[6] While this provision exempts the notes, debentures, and obligations issued by the PCA from state taxation, it does not exempt the PCA itself from all state taxation, as interpreted by both the District Court and the Court of Appeals.

It is apparent that the decision of the Eighth Circuit Court of Appeals with regard to the immunity of Production Credit Associations from state taxation was decided in a way that conflicts with the fundamental rule of the Court that issues should be decided upon principles of statutory construction rather than upon constitutional grounds. Consequently, it is imperative that the Court grant this Petition in order to determine this issue.

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[6]An amendment in 1988 inserted a comma after "interest" and "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority." Pub. L. 100-399, § 401(r), 102 Stat. 998.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals for the Eighth Circuit so that this honorable Court may review and correct the decision below.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-1856

Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Association,	★
Appellees,	★
v.	★ Appeal from the United States District
State of Arkansas	★ Court for the Eastern District of Arkansas.
Appellant.	★

Submitted: November 13, 1995

Filed: February 23, 1996

Before McMILLIAN and LOKEN, Circuit Judges and DUPLANTIER,* Senior District Judge.

DUPLANTIER, Senior District Judge:

Appellees, four Production Credit Associations (PCAs), brought suit in the United States District Court for the Eastern District of Arkansas against the State of Arkansas, seeking a declaratory judgment that they are exempt from state sales and income taxation and for an injunction prohibiting the state from imposing such taxes. The PCAs moved for summary judgment on the ground that there was no genuine issue of

*The HONORABLE ADRIAN G. DUPLANTIER, Senior United States District Judge for the Eastern District of Louisiana, sitting by designation.

material fact with respect to the issue of whether they were immune from state sales and income taxation because PCAs are statutorily declared instrumentalities of the United States and, absent express Congressional waiver, are entitled to immunity from such state taxation.

The state responded that Congressional declaration of PCAs as federal instrumentalities was insufficient to confer tax immunity and that waiver of immunity should be implied. The state further argued that it was necessary to make a factual inquiry into the governmental nature of PCAs in order to determine whether they are federal instrumentalities immune from state taxation. The District Court agreed with the PCAs and granted their motion for summary judgment.

We review the district court's grant of summary judgment de novo, and apply the same standard as applied by the district court. *Langley v. Allstate Ins. Co.*, 995 F.2d 841, 844 (8th Cir. 1993). Summary Judgment is appropriate if the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-2553, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Langley*, 995 F.2d at 844.

I. PCAs: Federal Instrumentalities Immune from State Taxation Absent Congressional Waiver

Production credit associations are expressly termed federal "instrumentalities" in relevant statutes[1] and case law[2].

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[1]The statute regarding taxation of production credit associations expressly designates them "instrumentalities" of the United States. In full, 12 U.S.C. § 2077 states:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, in-

Arkansas concedes that PCAs are federal instrumentalities, but contends that PCAs resemble private corporations, and that the structure and objectives of the PCAs within the farm credit system indicate that their connection to the federal government is not so close as to confer upon them immunity from state taxation.

Arkansas relies upon *United States v. New Mexico* to support its contention that federal instrumentalities like PCAs do not implicitly merit federal immunity from state taxation. Arkansas contends that *New Mexico* dictates that federal instrumentalities like PCAs are immune from state taxation only if, like government contractors, they are so closely connected to the Government that they "stand in the Government's shoes."[3] Arkansas thus argues that the district court's grant of summary judgment was erroneous; Arkansas should have the opportunity to present factual evidence concerning the function, control, ownership, and operation of the PCAs. We disagree.

Beginning with *M'Culloch v. State of Maryland*, 4 Wheat. 316 (1819), the Supreme Court has repeatedly[4] held that because of the Supremacy Clause of the United States Constitution, states have no power to tax federally created instrumentalities absent Congressional authorization. "[T]he

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[1]continued

> heritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

[2]"The PCA is an instrumentality of the United States. 12 U.S.C. § 2091 (1982)." *Rohweder v. Aberdeen Prod. Credit Assoc.*, 765 F.2d 109, 113 (8th Cir. 1985); *see Schlake v. Beatrice Prod. Credit Assoc.*, 596 F.2d 278, 281 (8th Cir. 1979).

[3]*See infra* note 5.

[4]*See, e.g., United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 605, 95 S.Ct. 1872, 1876, 44 L.Ed.2d 404 (1975); *First Agric. Nat. Bank v. State Tax Comm'n*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968), *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966); *see also United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990).

states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *Id.* at 436.

The proprietary functions and other attributes of the PCAs have no bearing on their status as federal instrumentalities immune from state taxation. The Supreme Court has made it clear that "the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank of Wichita v. Bd. of County Comm'rs*, 368 U.S. 146, 150-51, 82 S.Ct. 282, 286, 7 L.Ed.2d 199 (1961) (citing *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102, 62 S.Ct. 1, 5, 86 L.Ed. 65 (1941)). Arkansas makes no claim that the PCAs or their activities are unconstitutional. Thus, no further review or factual development of the PCAs' functions or objectives is necessary.

Arkansas incorrectly contends that the reasoning of *United States v. New Mexico* applies to PCAs. 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). In *New Mexico*, the Supreme Court clarified the test for determining which government contractors merit immunity from state taxation[5]. The Court granted certiorari solely "to consider the seemingly intractable problems posed by state taxation of federal contractors." 455 U.S. at 730. The Court thus considered and discussed the objectives, functions, and ownership of the contractors in light of the clarified standard after concluding that the contractors

[5]For such government contractors, "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." 455 U.S. at 735. In other words, "to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes'." *Id.* at 736. (citing *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503, 78 S.Ct. 458, 491, 2 L.Ed.2d 441 (1958)).

were not "instrumentalities" of the United States[6]. *Id.* at 739-40. By contrast, PCAs are federal instrumentalities, clearly designated as such by federal statutes. Thus *New Mexico* is readily distinguishable as applicable to tax immunity cases involving federal contractors, not Congressionally created federal instrumentalities like PCAs[7]. Indeed, in *New Mexico*, the Court reaffirmed the rule that federal instrumentalities are exempt from state taxation[8].

II. Congress Made No Express Waiver of the PCAs' Tax Immunity.

In order to subject federal instrumentalities such as PCAs to state taxation, Congress must enact a clear waiver of their exemption. *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966). "[W]here there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981) (citing *United States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157,

[6]The Court also noted that the United States, the party seeking the declaratory judgment that certain advanced funding to the contractors was not taxable by New Mexico, did not claim that the contractors were federal instrumentalities. *Id.* at 725.

[7]The Ninth Circuit has also distinguished *New Mexico* for similar reasons, noting that the case applied to "mere private contractor[s]," and not to a "United States instrumentality" like the American National Red Cross. *United States v. City of Spokane*, 918 F.2d 84, 87 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1053 (1991).

[8]The Court began its explanation of federal tax immunity with the "one constant" in the discussion: "a State may not, consistent with the Supremacy Clause, U.S. Const., Art. VI, cl. 2, lay a tax "directly upon the United States." *Id.* at 733 (citing *Mayo v. United States*, 319 U.S. 441, 447, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504 (1943)). The Court also quoted an earlier case which stated that if government contractors became "so incorporated into the government structure as to become instrumentalities of the United States," they would "thus enjoy governmental immunity." *Id.* at 736 (quoting *United States v. Boyd*, 378 U.S. 39, 48, 84 S.Ct. 1518, 1524, 12 L.Ed.2d 713 (1964)).

51 L.Ed. 571 (1977)), *aff'd*, 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982). The only congressional enactment which currently deals with state taxation of PCAs states that all notes, debentures, and other obligations of the associations are exempt from state taxes. 12 U.S.C. § 2077 (quoted in full, *supra*). Prior versions of statutes dealing with taxation of PCAs expressly exempted their "capital, reserves, surplus, and other funds, and their income." Farm Credit Act of 1971, Pub.L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971); Farm Credit Act of 1933, Pub.L. No. 73-75, § 63, 48 Stat. 257, 267 (1933). Arkansas contends that because the current statutory provision no longer contains such additional express waiver language, Congress has waived the PCAs' exemption. The converse can be argued with greater force: the current version of § 2077 acknowledges that because of the Supremacy Clause express exemption of the PCAs from state taxation in the earlier statutes constituted unnecessary surplus language. Where Congress is silent, the tax immunity of federal instrumentalities from state taxation is implied. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480, 59 S.Ct. 595, 598, 83 L.Ed. 927 (1939).

There is no provision in any statute, including 12 U.S.C. § 2077, which indicates an intent on the part of Congress to waive the PCAs' tax immunity as federal instrumentalities. Therefore, the PCAs, as instrumentalities of the United States, are immune to state taxation, and we affirm the district court's judgment to that effect.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. It is well-established that States may not tax agencies and instrumentalities of the United States absent Congress's consent. This principle was first articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), when the Court invalidated a discriminatory tax imposed on the Second Bank of the United States. Congress had not addressed the question in the statute, but the Bank's intergovernmental tax immunity was implied from the Supremacy Clause of the Constitution. *Id.* at 433.

In this century, the limit of this implied immunity has

evoked sharp debate among Supreme Court Justices. *See, e.g., First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1968); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). But all have agreed on one principle — it is for Congress to determine (i) which Federal instrumentalities should enjoy immunity from state and local taxation, *and* (ii) the extent of that immunity. As the Court said in *United States v. City of Detroit*, 355 U.S. 466, 474 (1958):

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

In no area has the Court more consistently deferred to Congress than in the many cases dealing with state and local taxation of banks and other lending institutions chartered or established under Federal law. *See First Agric. Nat'l Bank*, 392 U.S. at 341-46; *Federal Land Bank v. Board of County Comm'rs*, 368 U.S. 146 (1961); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939). Some of these cases referred to the doctrine of implied constitutional immunity, but all were decided on the basis of careful statutory analysis. In my view, it is that principle of deference to the legislature that should guide us, not this court's potentially mischievous dictum in prior cases to the effect that "Congress must express a clear, express, and affirmative desire to waive" the implied constitutional immunity, *supra* p.5. With that essential preamble, I turn to the intricacies of the statutes here at issue.

The Farm Credit System is a nationwide network of borrower-owned cooperative lending institutions intended to serve the unique credit needs of the agricultural sector. *See* H.R. Rep. No. 425, 99th Cong., 1st Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591. The System began in 1916, when the Federal Farm Loan Act authorized the creation of twelve regional Federal Land Banks ("FLBs"). Pub. L. No. 64-158, § 4, 39 Stat. 360, 362 (1916). FLBs were to be partially owned and funded by the Federal government. Both the banks themselves, and their debt obligations, were given a broad

statutory exemption from state and local taxes, except real property taxes:

> [E]very Federal land bank . . . including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank. . . . [F]arm loan bonds issued under the provisions of this Act shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation. . . . Nothing herein shall be construed to exempt the real property of Federal . . . land banks . . . from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Id. § 26, 39 Stat. at 380.

FLBs were only authorized to make agricultural loans secured by first mortgages on farm lands. In 1923, Congress created the Federal Intermediate Credit Banks ("FICBs") to make other types of farm loans. FICBs received the same broad statutory tax exemption as FLBs. Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923). In 1987, Congress merged the FLBs and the FICBs into Farm Credit Banks. With minor changes in statutory language, Farm Credit Banks today enjoy the same statutory tax exemption first granted FLBs in 1916. *See* 12 U.S.C. § 2023.

This case involves Production Credit Associations ("PCAs"), first created by Congress in the Farm Credit Act of 1933 to provide short-to-intermediate-term loans directly to farmers and ranchers. *See* Pub. L. No. 73-98, § 20, 48 Stat. 257, 259-60 (1933). PCAs were initially capitalized and owned entirely by the Federal government, but Congress hoped ("expected" might be too strong a word given Depression-era economic conditions) that PCA excess earnings would be used to retire the government's stock, resulting in "local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost." S. Rep. No. 124, 73d

Cong., 1st Sess. 2 (1933). Congress reflected that hope in the express but limited tax exemption granted PCAs in the 1933 Act:

> Production Credit Associations . . . and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by [PCAs] shall be exempt both as to principal and interest from all taxation . . . imposed by the United States or by any State, Territorial, or local taxing authority. [PCAs], their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property . . . shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *The exemption provided herein shall not apply with respect to any [PCA] or its property or income after the stock held in it by the [United States] has been retired.* . . .

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). This is a very different exemption than Congress granted the earlier farm credit institutions, FLBs and FICBs. Congress did not explain why it linked the PCAs' tax exemption to government ownership, and why it did not also impose that limitation on FLBs and FICBs.[1]

By the early 1960s, many PCAs were privately owned, and States began assessing various taxes, relying upon the last sentence of the above-quoted statute. Some PCAs resisted, claiming implied immunity as Federal instrumentalities. To my knowledge, every state appellate court to consider the question rejected the PCAs' position, concluding that the

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[1]The other differences in wording between the exemptions granted to FLBs and PCAs may simply reflect an evolution in drafting. The PCA form of exemption, without the critical last sentence dealing with retirement of the government's stock, is also found in the 1933 statute which created the government-owned Home Owners' Loan Corporation. *See* Pub. L. 73-43, § 4(c), 48 Stat. 128, 130 (1933).

Federal statute was express consent for state taxation of privately-owned PCAs. *See, e.g., Baker PCA v. State Tax Comm'n*, 421 P.2d 984 (Or. 1966); *Woodland PCA v. Franchise Tax Bd.*, 37 Cal. Rptr. 231 (Dist. Ct. App. 1964); *Montana Livestock PCA v. State*, 393 P.2d 50 (Mont. 1964); *Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio), *cert. denied*, 371 U.S. 826 (1962).

By 1968 all PCAs were owned entirely by their borrower-members. *See* H.R. Rep. No. 593, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 2091, 2098. When Congress substantially rewrote these statutes in the Farm Credit Act of 1971, it left unchanged the differing exemptions granted to various System lenders. *See* Pub. L. No. 92-181, §§ 1.21, 2.8, 2.17, 3.13, 85 Stat. 583, 590, 597, 602, 608-09 (1971); H.R. Rep. No. 593, 1971 U.S.C.C.A.N. at 2107-13.[2] I suspect that PCAs operating under the 1971 Act routinely paid state and local taxes in the many States with statutes expressly taxing PCAs to the extent permitted by Federal law,[3] but the record in this case is regrettably silent on the point.

Congress again overhauled the farm credit statutes in 1985, responding to a crisis in the agricultural sector that threatened to bankrupt the System. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648, 650-52 (D.C. Cir. 1992). Congress made the Farm Credit Administration a more independent regulator, led by a three-member Board instead of a Governor. To conform the statute to this new agency configuration, prior references to the Governor needed to be deleted, including one that had been added to the last sentence of the PCAs' tax exemption provision, § 2.17 of the 1971 Act. However, rather than simply delete this reference to the Governor, Congress deleted the last two sentences of § 2.17. *See* Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1678, 1705

[2]Of the other System lending institutions, Federal Land Bank Associations currently have the same exemption as Farm Credit Banks, 12 U.S.C. § 2098, while Banks for Cooperatives, first created in 1933 along with the PCAs, continue to have the same limited exemption as PCAs, 12 U.S.C. § 2134.

[3]*See, e.g.*, Ala. Code § 40-16-2; Ind. Code § 6-5-12; N.Y. City Inc. Bus. Tax § 31; N.C. Gen. Stat. § 105-102.1; S.D. Cod. Laws § 10-43-2.1; Tenn. Code Ann. §§ 56-4-401 — 03.

(1985). What remained, with minor subsequent changes,[4] was the statutory tax exemption for PCA obligations quoted in footnote 1 of the court's opinion, now codified at 12 U.S.C. § 2077.

This 1985 amendment deleted the express exemption that had been granted to a PCA and its income for so long as the PCA was Government-owned. The relevant Committee Report described this as merely a technical change. *See* H.R. Rep. No. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615. Although more than the reference to the Governor was deleted, that is a logical explanation since there were *no* publicly-owned PCAs in 1985 eligible to enjoy the deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption, for which no PCA remained eligible, as the grant of a far broader implied exemption. Indeed, depending upon how one applies opaque dictum in the last paragraph of *McCulloch v. Maryland*, 17 U.S. at 436, the effect of this decision may be to exempt PCAs from state and local real property taxes, an exemption broader than *any* Farm Credit institution has enjoyed in the eighty-year history of the System.[5]

[4]This section was reenacted in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1568, 1633 (1987).

[5]The court creates this uncertainty despite a 1988 colloquy between a Member of the House of Representatives and the Member who had been Chairman of the House Committee on Agriculture in 9185:

> MRS. SMITH OF NEBRASKA. Is it your understanding that although local governments are not given specific authority to levy property taxes on property owned by [PCAs], they are not prevented from doing so?
>
> MR. DE LA GARZA. Mr. Speaker, I would inform the gentlewoman from Nebraska that that is the advice of our legal counsel and certainly consistent with my understanding of the [1985] conference.

134 Cong. Rec. H 462 (daily ed. Feb. 23, 1988). Although postenactment views of individual legislators are not usually reliable indicators of legislative intent, the House in 1988 was considering whether a further technical amendment was needed to clarify that PCAs, like all other Farm Credit System banks, are subject to real property taxation. So this colloquy is quite persuasive support for my interpretation of the 1985 amendment.

If normal principles of statutory construction are applied, it is obvious to me that the technical change intended by the 1985 amendments should not be construed as having the extraordinary substantive effect urged by the appellee PCAs. Because PCAs had no exemption from state and local taxation before the 1985 amendment (other than the exemption for their obligations), they should have no exemption under the statute as amended, 12 U.S.C. § 2077. But this court concludes otherwise, adhering — in my view blindly — to "no express waiver" dicta in earlier cases that discussed the implied constitutional immunity. This decision is illogical, and it is contrary to the overriding rule, grounded in constitutional and statutory principles, that defining the extent of federal instrumentality tax immunity is a quintessentially legislative task. Accordingly, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION — PLAINTIFFS

V. No. LR-C-94-394

STATE OF ARKANSAS — DEFENDANT

Filed March 6, 1995

ORDER

Plaintiffs are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. In this lawsuit, plaintiffs seek declaratory judgment that they are exempt from state and local taxes and an injunction barring the State of Arkansas from imposing, assessing, or collecting taxes from them.

The defendant State of Arkansas has moved to dismiss the complaint for want of subject matter jurisdiction, for failure to state a claim and because the suit is barred by the Tax Injunction Act, 28 U.S.C. § 1341.

This Court does have subject matter jurisdiction to hear a claim for injunctive relief from a state regulation on the ground that the regulation is preempted by federal law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). The complaint in this case does state a claim upon which relief can be granted. Plaintiffs have been denied tax exempt status by the State of Arkansas. They need not wait until taxes are assessed against them to apply to this Court for relief.

The United States Supreme Court has squarely held that the Tax Injunction Act does not apply to "suits by the United

States to protect itself and its instrumentalities from unconstitutional state exaction." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). The Motion to Dismiss is without merit, and is denied.

The plaintiffs have moved for summary judgment on the ground that they are federal instrumentalities and, as such, enjoy immunity from state and local taxation. There can be no serious dispute that the plaintiffs are federal instrumentalities. In at least three places in the United States Code, production credit associations are expressly referred to as "federal instrumentalities":

> 12 U.S.C. § 2071(a): "Each production credit association shall continue as a Federally chartered instrumentality of the United States."
>
> 12 U.S.C. § 2071(b)(7): "On approval of the proposed articles . . . the [production credit] association shall become as of such date a federally chartered body corporate and an instrumentality of the United States."
>
> 12 U.S.C. § 2077: "Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation . . . imposed by the United States or any State. . . ."

Furthermore, the Court of Appeals for the Eighth Circuit has specifically held production credit associations to be instrumentalities of the United States. *Rohweder v. Aberdeen Production Credit Association*, 765 F.2d 109 (1985).

The defendant argues that even if the plaintiffs are instrumentalities of the United States, that finding does not end the inquiry into plaintiffs' status as tax exempt. Defendant contends that the plaintiffs must demonstrate that they are federal instrumentalities for purposes of state taxation exemption. The defendant also argues that the plaintiffs' immunity from state taxation has been waived by Congress.

The defendant has failed to meet the plaintiffs' evidence that they are federal instrumentalities. Although the defendant complains that the plaintiffs included only some of their bylaws in support of the motion for summary judgment, the defendant has failed to offer other bylaws, or any other evidence, to indicate that the plaintiffs are not federal instrumentalities.

The defendant's argument that the plaintiffs must prove they are federal instrumentalities for purposes of exemption from state taxes is misplaced. It is true that Production Credit Associations do not enjoy all immunities of the United States, even though they are federal instrumentalities. However, implied immunity from state taxation for federal instrumentalities has been a settled niche in American jurisprudence since the early days of the Republic. Once it has been determined that the plaintiffs are federal instrumentalities, there arises an implied immunity from state and local taxation. *McCulloch v. Maryland*, 17 U.S. 316 (1819). *First Agriculture National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968).

The burden rests with the defendant to demonstrate that Congress has waived immunity from state taxation. Congress can waive tax immunity, but such waiver must be express:

> Congress must express a clear, express, and affirmative desire to waive the immunity from taxation enjoyed by a federal instrumentality.

Federal Reserve Bank of St. Louis v. Metrocentre Improvement District #1, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd* 455 U.S. 995 (1982). Defendant has directed the Court to no express waiver from taxation, nor is the Court aware of any such express waiver. Thus, the defendant's only argument is that Congress has impliedly waived immunity from taxation for production credit associations. That is insufficient to sustain the burden.

Accordingly, the plaintiffs' Motion for Summary Judgment must be, and hereby is, granted. The defendant's Motion to Dismiss is denied. This case is dismissed.

DATED this 6th day of March, 1995.

/s/ Henry Woods, United States District Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 2001 provides, in pertinent part:

(b) It is the objective of this chapter to continue to encourage farmer- and rancher-borrowers participation in the management, control, and ownership of a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit, and to modernize and improve the authorizations and means for furnishing such credit and credit for housing in rural areas made available through the institutions constituting the Farm Credit System as herein provided.

12 U.S.C. § 2002 provides, in pertinent part:

(a) Composition The Farm Credit System shall include the Farm Credit Banks, the Federal land banks associations, the production credit associations, the banks for cooperatives, and such other institutions as may be made a part of the System, all of which shall be chartered by and subject to regulation by the Farm Credit Administration.

12 U.S.C. § 2071 provides:

(a) Charter

Each production credit association shall continue as a Federally chartered instrumentality of the United States.

(b) Organization

(1) In general

Production credit associations may be organized by 10 or more farmers or ranchers or producers or harvesters of aquatic products desiring to borrow money under the provisions of this part.

(2) Articles of association

The proposed articles of association shall be forwarded to the Farm Credit Bank for the district accompanied by an agreement to subscribe on behalf of the association for stock in the bank in such amounts as may be required by the bank.

(3) Contents of articles

The articles shall specify in general terms the —

(A) objects for which the association is formed;

(B) powers to be exercised by the association in carrying out the functions authorized by this part; and

(C) territory the association proposes to serve.

(4) Signatures

The articles shall be signed by persons desiring to form such an association and shall be accompanied by a statement signed by each such person establishing eligibility to borrow from the association in which such person will become a stockholder.

(5) Copy to FCA

A copy of the articles of association shall be forwarded to the Farm Credit Administration with the recommendations of the bank concerning the need for such an association in order to adequately serve the credit needs of eligible persons in the proposed territory and whether that territory includes any area described in the charter of another production credit association.

(6) Denial of charter

The Farm Credit Administration for good cause shown may deny the charter.

(7) Approval of articles

On approval of the proposed articles by the Farm Credit Administration, and on the issuance of a charter, the association shall become as of such date a federally chartered body corporate and an instrumentality of the United States.

(8) Powers of FCA

The Farm Credit Administration shall have the power, under rules and regulations prescribed by the Farm Credit Administration or by prescribing in the terms of the charter, to —

(A) provide for the organization of the association;

(B) provide for the initial amount of stock of the association;

(C) provide for the territory within which the association's operations may be carried on; and

(D) approve amendments to the charter of the association.

12 U.S.C. § 2072 provides:

Each production credit association shall elect from the voting members of such association, a board of directors of such number, for such terms, with such qualifications, and in such manner as may be required by the bylaws of the association, except that at least one member shall be elected by the other directors, which member shall not be a director, officer, employee, stockholder, or agent of a System institution.

12 U.S.C. § 2073 provides:

Each production credit association shall be a body corporate and, subject to supervision by the Farm Credit Bank for the district and regulation by the Farm Credit Administration, shall have the power to —

(1) have succession until terminated in accordance with this chapter or any other Act of Congress;

(2) adopt and use a corporate seal;

(3) make contracts;

(4) sue and be sued;

(5) acquire, hold, dispose, and otherwise exercise all of the usual incidents of ownership of real and personal property necessary or convenient to the business of the association;

(6) operate under the direction of the board of directors of the association in accordance with the provisions of this chapter;

(7) subscribe to stock of the bank;

(8) purchase stock of the bank held by other production credit associations and stock of other production credit associations;

(9) contribute to the capital of the bank or other production credit associations;

(10) invest funds of the association as may be approved by the Farm Credit Bank under regulations of the Farm Credit Administration and deposit the current funds and securities of such with the Farm Credit Bank, a member bank of the Federal Reserve System, or any bank insured under the Federal Deposit Insurance Corporation, and may pay fees therefor and receive interest thereon as may be agreed;

(11) buy and sell obligations of or insured by the United States or of any agency thereof or of any banks of the Farm Credit System and buy from and sell to such banks, interests in loans and in other financial assistance extended and nonvoting stock, as may be authorized by the Farm Credit Bank in accordance with regulations of the Farm Credit Administration;

(12) borrow money from the Farm Credit Bank, and with the approval of such bank, borrow from and issue notes or other obligations to any commercial bank or other financial institution;

(13) make and participate in loans, accept advance payments, and provide services and other assistance as authorized in this part and charge fees therefor, and when authorized by the bank participate with one or more other Farm Credit System institutions in loans made under this subchapter or other subchapters of this chapter on the basis prescribed in section 2206 of this title;

(14) endorse and become liable on loans discounted or pledged to the Farm Credit Bank;

(15) as may be authorized by the Farm Credit Bank in accordance with regulations of the Farm Credit Administration, agree with other Farm Credit System institutions to share loan or other losses, whether to protect against capital impairment or for any other purpose;

(16) prescribe, by its board of directors, its bylaws that shall be consistent with law, and that shall provide for —

(A) the classes of its stock and the manner in which such stock shall be issued, transferred, and retired; and

(B) the manner in which it is to —

(i) select officers and employees;

(ii) acquire, hold, and transfer property;

(iii) conduct general business; and

(iv) exercise and enjoy the privileges granted to it by law;

(17) provide by its board of directors for a manager or other chief executive officer, and provide for such other officers or employees as may be necessary, including joint employees as provided in this chapter, define their duties, and require surety bonds or make other provisions against losses occasioned by employees, but no director shall, within one year after the date when such director ceases to be a member of the board, serve as a salaried employee of the association on the board of which he served;

(18) elect by the board of directors of the association a loan committee with power to approve applications for membership in the association and loans or participations or, with the approval of the bank, delegate the approval of applications for membership and loans or participations within specified limits to other committees or to authorized officers and employees of the association;

(19) perform any functions delegated to the association by the bank;

(20) exercise by the board of directors or authorized officers or employees of the association, all such incidental powers as may be necessary or expedient to carry on the business of the association; and

(21) operate as an originator and become certified as a certified facility under subchapter VIII of this chapter.

12 U.S.C. § 2077 provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest, on such obligations shall be subject to Federal income taxation in the hands of the holder.

(2) No. 95-1918

In The

Supreme Court of the United States

October Term, 1995

STATE OF ARKANSAS,

Petitioner,

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Association, and Delta Production Credit Association, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, the State of Arkansas.

STATEMENT OF THE CASE

Respondents are four production credit associations which brought suit in the United States District Court for the Western Division of Arkansas, seeking a declaratory judgment that production credit associations are exempt from Arkansas sales and income taxation and for an injunction against Petitioner's imposition of such taxes. On March 6, 1995, the District Court granted summary judgment for Respondents. The District Court held that there are no genuine issues of material fact, that the production credit associations are federal instrumentalities, and that Congress has not expressly waived their immunity from state income and sales taxation.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court's decision on February 23, 1996, holding that the production credit associations are federal instrumentalities immune from state income and sales taxation because Congress has made no express waiver of their tax immunity.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Petition for Writ of Certiorari asserts that this Court should review the decision of the Eighth Circuit Court of Appeals because of an alleged conflict with decisions of this Court. (Petition at 4). The Petition should be denied because the decision of the Eighth Circuit Court of Appeals does not conflict with any decision of this Court. The decision applies established principles regarding the taxation of federal instrumentalities.

The Eighth Circuit opinion first concludes that the Respondents are federal instrumentalities. The opinion then states that a federal instrumentality is subject to state income and sales taxes only if Congress has expressly waived the federal instrumentality's immunity from such taxes. Finally, the opinion reviews the Farm Credit Act and concludes that Congress has not expressly waived Respondents' immunity from state income and sales taxes. Each of these conclusions is fully consistent with prior decisions of this Court.

In concluding that Respondents are federal instrumentalities, the Court of Appeals stated:

> Production Credit Associations are expressly termed "federal instrumentalities" in relevant statutes and case law.

76 F.3d 961, 962 (8th Cir. 1996) (footnotes omitted) (Petitioner's Appendix at A-2). In response to the argument that Respondents

engage in proprietary activities, the Court of Appeals stated that the activities of a federal instrumentality are, as a matter of law, governmental, not proprietary. This statement is consistent with and is based upon this Court's decisions in *Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146 (1961) and *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941). In *Federal Land Bank of Wichita*, this Court stated:

> If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed.

368 U.S. at 150-51. Petitioner has neither challenged the constitutionality of the Farm Credit Act nor claimed that Respondents' activities were outside the authority granted them. In finding that Respondents are federal instrumentalities and in holding that they are engaged in performing a governmental function, the Court of Appeals relied upon the express terms of the Farm Credit Act and followed this Court's prior decisions regarding the federal instrumentality status of member institutions of the Farm Credit System.

Having found that Respondents are federal instrumentalities, the Court of Appeals held that Respondents are exempt from state income and sales taxation unless Congress has expressly waived their exemption. This holding is based upon this Court's decision in *Department of Employment v. United States*, 385 U.S. 350 (1966), which held that in order to subject a federal instrumentality to state taxation, Congress must enact a clear waiver of its tax exemption.

The Court of Appeals opinion is also consistent with this Court's decision in *United States v. Alleghany County*, 322 U.S. 174 (1944). In that case, Justice Jackson observed:

> . . . but unshaken, rarely questioned, and indeed not questioned in this case, is the principal that possessions, institutions and activities of the Federal Government itself in the absence of express congressional consent, are not subject to any form of state taxation.

322 U.S. at 177.[1] Thus, the Court of Appeals' conclusion that Respondents are exempt from state taxation absent an express congressional waiver of their state tax immunity is fully consistent with prior decisions of this Court and other Circuit Courts of Appeals which have considered this question.

To determine whether Congress had expressly waived Respondents' immunity from state income and sales taxation, the Court of Appeals canvassed the Farm Credit Act, with particular attention to 12 U.S.C. § 2077. The court concluded that nothing in any statute, including 12 U.S.C. § 2077, indicates any intent on the part of Congress to waive Respondents' tax immunity. Consequently, the court concluded that Respondents are immune from Arkansas income and sales taxation.

Petitioner claims that the Court of Appeals refused to construe 12 U.S.C. § 2077. (Petition at 9). A more accurate statement is that the Court of Appeals refused to accept Petitioner's construction of the statute. Petitioner argued that by deleting the previous express waiver of immunity from state income and sales taxation, Congress impliedly waived

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1. In addition to the Eighth Circuit Court of Appeals decisions cited in the Court of Appeals' decision, the Courts of Appeals for the First and Sixth Circuits have also held that federal instrumentalities are immune from state taxation absent a specific congressional waiver of immunity. *United States v. State Tax Commission*, 481 F.2d 963, 969 (1st Cir. 1973), and *United States v. State of Michigan*, 851 F.2d 803, 805 (6th Cir. 1988).

Respondents' immunity from tax. The court's rejection of this argument applies the settled rule that any waiver of the tax immunity of federal instrumentalities must be express, not implied.

In sum, Petitioner's claim that the decision below conflicts with the applicable decisions of this Court simply cannot withstand examination. The Court of Appeals applied established principles to conclude that Respondents are federal instrumentalities and that there has been no express waiver of their tax immunity. The court's analysis and decision is fully consistent with, and not in conflict with, this Court's prior decisions regarding the taxation of federal instrumentalities.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari filed by the State of Arkansas should be denied.

Respectfully submitted,

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No. 95-1918

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Tax Injunction Act, 28 U.S.C. 1341, bars the district court from exercising jurisdiction over a suit by a privately owned production credit association, which is statutorily defined as a "federal instrumentality," to challenge the imposition of state taxes.

2. Whether the State of Arkansas may levy sales and income taxes upon production credit associations consistent with 12 U.S.C. 2077.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents are four production credit associations chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*). Pet. App. B1. Production credit associations were first established by the Farm Credit Act of 1933, ch. 98, § 20, 48 Stat. 259. Those associations are part of the United States' farm credit system, which includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a). Production credit associations, like each entity within the farm credit system,

are statutorily defined instrumentalities of the United States. 12 U.S.C. 2071(a) and (b)(7) (production credit associations); 12 U.S.C. 2011(a) (farm credit banks), 2091(a) and (b)(4) (federal land bank associations), 2121 (banks for cooperatives).

Production credit associations are organized generally by ten or more farmers or ranchers, 12 U.S.C. 2071(b)(1), to provide short- and intermediate-term loans for agricultural purposes and for certain types of rural housing, 12 U.S.C. 2075. In order to encourage and assist those organizations, the United States, through Production Credit Corporations, originally subscribed to some of the stock in production credit associations formed under the 1933 Act. See H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971). By 1968, the United States' ownership interest in previously organized associations had been retired, and production credit associations were owned entirely by their private borrower-members. *Ibid.* Today, there are 66 chartered production credit associations operating throughout the United States. Farm Credit Administration, *1995 Annual Report on the Financial Condition and Performance of the Farm Credit System* 5 (1996).

2. In the Farm Credit Act of 1933, the obligations of production credit associations, such as notes, debentures and bonds, "both as to principal and interest," were exempted from all federal, state, and local taxation, "except surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. Production credit associations themselves, along with their property and income, also were exempted from all taxation, except that their real property and their tangible personal property were subject to "Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Ibid.* If and when the United States retired its stock ownership in a production credit association (through a production credit corporation), however, the exemption on taxation of the association, its property, and its income was no longer effective. *Ibid.*

When Congress amended the Farm Credit Act in 1971, all previously organized production credit associations were privately owned. H.R. Rep. No. 593, *supra*, at 8. Congress nevertheless retained each production credit association's stated exemption from taxation. That exemption, however, remained the same as it had been before the 1971 amendments—an exemption from taxation for only so long as the United States (through the Farm Credit Administration) held stock in the association. Pub. L. No. 92-181, § 2.17, 85 Stat. 602. The amended statute provided:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.*

Ibid. (emphasis added).

In 1985, Congress passed the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678. That

Act restructured the Farm Credit Administration so that it would no longer be controlled by a Governor but by a three-member board, § 201(1), 99 Stat. 1688, and modified the role of the Farm Credit Administration within the farm credit system, see § 201(7), 99 Stat. 1691. Because of the changes to "the basic powers, duties and authorities of the Farm Credit Administration," the Act also contained "numerous technical and conforming amendments." H.R. Rep. No. 425, 99th Cong., 1st Sess. 28 (1985); see Pub. L. No. 99-205, § 205, 99 Stat. 1703-1707. Among those technical amendments was the deletion of the two sentences within Section 2.17 of the 1971 Act italicized above that exempted a production credit association from taxation contingent upon stock ownership by the "Governor of the Farm Credit Administration." Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1705. The 1985 Act left the section, then codified at 12 U.S.C. 2098 (Supp. III 1985), much as it presently exists, now codified at 12 U.S.C. 2077.[1] The amended Section 2077 retains the 60-year-old statutory exemption from federal, state, and local taxes for "all notes, debentures, and other obligations issued by" the production credit associations, "except surtaxes, estate, inheritance, and gift taxes." The statute does not afford the associations any additional exemptions from taxation, regardless of the federal government's stock holdings.

3. Respondents brought suit in the United States District Court for the Eastern District of Arkansas against

[1] In 1988, Congress reenacted without any change the text of Section 2098, which was redesignated as Section 2077, in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633. Congress subsequently amended Section 2077 by inserting a comma after "interest" and by adding a second exception to the tax exemption, inserting the clause "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority." Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998.

the State of Arkansas, requesting both a declaratory judgment that they are exempt from state sales and income taxes and an injunction prohibiting petitioner from levying such taxes upon them. Pet. App. A1. In their motion for summary judgment, respondents contended that they were entitled to constitutional immunity from state taxes because they are federal instrumentalities of the United States and because Congress did not expressly waive that immunity. *Id.* at A2. Petitioner conceded that respondents are federal instrumentalities. *Id.* at A3. Petitioner argued, however, that federal instrumentality status does not *per se* entitle respondents to state and local tax immunity, and that there must be a factual inquiry into respondents' governmental nature before they may be deemed to be instrumentalities immune from state taxation (*id.* at A2). Alternatively, petitioner contended that the history of Section 2077 showed that Congress had granted production credit associations only a limited exemption from taxation and had, therefore, waived respondents' constitutional immunity (see *id.* at A6).

The district court granted respondents' motion for summary judgment, concluding that, as federal instrumentalities, respondents are entitled to immunity from state taxation. Pet. App. B1-B3. The district court held that, although Congress may waive the constitutional immunity of the United States or its instrumentalities from state or local taxation, the waiver must be express; an "implied" waiver is insufficient. *Id.* at B3. The district court also rejected petitioner's argument that the Tax Injunction Act, 28 U.S.C. 1341, divested the court of jurisdiction over respondents' suit. Pet. App. B1-B2.

4. The court of appeals affirmed by a 2 to 1 decision. Pet. App. A1-A12. The court held that, under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, "states have no power to tax federally created instrumentalities absent Congressional authorization." Pet. App. A3. The factual extent of the United States'

control or ownership of respondents is irrelevant, in the court's view, because production credit associations are statutorily defined federal instrumentalities performing recognized constitutional functions. *Id.* at A4-A5. The court also determined that Congress's failure to provide statutorily that production credit associations are immune from taxation does not create an implied waiver of the immunity under the Supremacy Clause. *Id.* at A6. Any waiver from the constitutional immunity must be express, and "[t]here is no provision in any statute * * * which indicates an intent on the part of Congress to waive the [production credit associations'] tax immunity as federal instrumentalities." *Ibid.*

In dissent, Judge Loken stated that it is solely Congress's province to decide which and to what extent federal instrumentalities are entitled to immunity from state taxation. Pet. App. A6-A7. After tracing the history of production credit associations, he observed that the only comprehensive tax exemption Congress had ever granted such an association had been contingent upon the United States' stock ownership in it. *Id.* at A8-A10. By 1968, however, the United States did not own stock in any production credit association. *Id.* at A10. Judge Loken placed emphasis on the legislative history of the 1985 amendment to Section 2077 that deleted the sentences conferring the contingent tax exemption. He read that legislative history to establish Congress's intent for the amendment to create only a "technical change" that was likely designed to remove the reference to the Governor of the Farm Credit Administration, who was being replaced by a three-member board. *Id.* at A11.

> Although more than the reference to the Governor was deleted, that is a logical explanation since there were *no* publicly-owned [production credit associations] in 1985 eligible to enjoy the deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption for which no [production credit association] remained eligible, as the grant of a far broader implied exemption.

Ibid. Judge Loken concluded that, because production credit associations were not in fact exempt from taxation before the 1985 amendment to Section 2077, they are not entitled to exemption after the amendment. *Id.* at A12.

DISCUSSION

The decision of the court of appeals is incorrect, both in its implicit jurisdictional holding and in its holding on the merits. First, the court's implicit decision to uphold the district court's exercise of jurisdiction conflicts with decisions of other courts of appeals denying jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341, over suits by a federal instrumentality that neither is joined as a plaintiff by the United States nor otherwise implicates an important governmental function or interest in the lawsuit. Moreover, on the merits, the court's holding erroneously construes the Farm Credit Act of 1971, 12 U.S.C. 2077, in a manner that calls into question long-standing impositions of state taxes on production credit associations in which the federal government does not have an ownership interest.

1. Although the court of appeals did not explicitly address the district court's jurisdiction over this case, it is well-settled that subject-matter jurisdiction may be raised at any point in litigation, even by this Court's own motion. See, *e.g.*, *Sumner* v. *Mata*, 449 U.S. 539, 547 n.2 (1981); *Louisville & N.R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). See also C. Wright, *Law of Federal Courts* 28 (5th ed. 1994) (suggesting that rule has special justification when problems of federal-state relations

are involved).[2] The courts of appeals take differing approaches over whether, in light of the prohibition contained in the Tax Injunction Act, 28 U.S.C. 1341, federal courts have jurisdiction to hear suits brought by "instrumentalities" of the United States to enjoin state taxes, when the United States is not also a plaintiff in the action. The decision by the court below implicitly to uphold jurisdiction is both incorrect and contrary to decisions of other courts of appeals.

a. The Tax Injunction Act, 28 U.S.C. 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[3]

This Court has recognized that Section 1341 "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). In that case, the Court considered whether Section 1341 operated to bar a suit by the American Red Cross and the United States as co-plaintiffs to enjoin application of a Colorado unemployment compensation tax to the Red Cross. The Red Cross asserted that it was a "federal instrumentality," a contention supported by the United States as co-plaintiff, and that to impose the state tax would be unconstitutional under *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This Court held that "an unbroken line of authority and convincing evidence of legislative purpose" established that the United States could bring suit "to protect itself and its instrumentalities from unconstitutional state exactions." 385 U.S. at 358 (footnote omitted).

The district court in this case cited *Department of Employment* in concluding that a challenge to its jurisdiction was "without merit" (Pet. App. B2). That court summarily denied a motion to dismiss, and the court of appeals did not address that issue in its opinion.

b. Contrary to the summary treatment by the courts below, the question whether a "federal instrumentality" may overcome the bar of Section 1341 when the United States is not a plaintiff has divided the courts of appeals. This Court has not had occasion since *Department of Employment* to consider whether, and if so under what circumstances, a federal instrumentality may bring suit to enjoin state taxes when the United States is not a co-plaintiff.[4]

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[2] The jurisdictional bar in the Tax Injunction Act has been held to be non-waivable. See, *e.g.*, *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992); *Keleher* v. *New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2d Cir. 1991); *Hardwick* v. *Cuomo*, 891 F.2d 1097, 1103-1104 (3d Cir. 1989). See generally R. Fallon, D. Meltzer & D. Shapiro, eds., *Hart and Wechsler's The Federal Courts and the Federal System* 1217 (4th ed. 1996). This view is consistent with this Court's decision in *California* v. *Grace Brethren Church*, 457 U.S. 393, 417 & n.38 (1982), in which the Court held that the Tax Injunction Act deprived the district court of jurisdiction even though the State had attempted to invoke that court's jurisdiction. Thus, the apparent failure of petitioner to raise on appeal, and of the court of appeals to consider, the jurisdictional question should not inhibit this Court's review of that issue.

[3] This Court has held that the statute is jurisdictional and applies to suits for a declaratory judgment as well as to suits for an injunction. *California* v. *Grace Brethren Church*, 457 U.S. at 408-411; *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 338-339 (1990). Cf. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943).

[4] By statute, only the Department of Justice may represent the United States in litigation. Section 516 of Title 28 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

By statute, each production credit association has the power to "sue and be sued," 12 U.S.C. 2073(4), but that provision does not

The Ninth and Second Circuits have been the most restrictive in permitting federal instrumentalities, without the United States as a plaintiff in the action, to seek equitable relief from state taxation. In *Housing Authority of Seattle* v. *Washington*, 629 F.2d 1307 (1980), for example, the Ninth Circuit addressed whether a housing authority could sue to enjoin state taxation absent the United States as a party to the suit. As the court noted, "[t]he United States * * * is not a party to the present suit. The record does not reflect whether the Authority requested the United States to join as plaintiff, nor whether the Justice Department was even aware of the suit." *Id.* at 1311. Citing *United States* v. *State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), the court in *Housing Authority* "agree[d] that such joinder [of the United States] is necessary before a federal instrumentality can overcome the restrictions of [Section 1341]." 629 F.2d at 1311.

The court further noted, however, that the First Circuit had subsequently created an exception to the "general principle requiring joinder of the United States with the federal instrumentality," 629 F.2d at 1311, when the federal instrumentality was effectively an "arm[] of the federal government" and a state tax "called directly into question the sovereign interest of the United States," *ibid.* (quoting *Federal Reserve Bank of Boston* v. *Commissioner of Corporations & Taxation of Massachusetts*, 499 F.2d 60, 62 (1st Cir. 1974)). Although in *Housing Authority* the Ninth Circuit reserved the question whether it would agree with the First Circuit's approach in *Federal Reserve Bank*, it concluded that, even under the First Circuit test, the housing authority was "not the kind of federal instrumentality" that may "maintain a suit in federal court challenging state taxation without the United

empower a production credit association to represent the United States in litigation; it only authorizes the production credit association to represent itself in a lawsuit. See *ibid.*

States joining as a plaintiff in the suit." 629 F.2d at 1311-1312.[5]

In *FDIC* v. *New York*, 928 F.2d 56 (1991), the Second Circuit affirmed the dismissal under Section 1341 of an injunction suit brought by the FDIC against a State. An assistance agreement between the FDIC and a savings bank in questionable condition had assigned to the FDIC all of the bank's claims against any officers, underwriters or "any others." *Id.* at 58. The FDIC's suit contended that application of the state taxes at issue contravened a federal law giving the FDIC authority to issue promissory notes in exchange for banks' "net worth certificates," and thus violated the Supremacy Clause. *Id.* at 58-59.

Noting that "the federal instrumentality exception to the [Tax Injunction] Act is based on traditional principles of comity," the Second Circuit could not "find that the purposes of the instrumentality exception would be served by allowing the FDIC to proceed with this action in federal court," because "by bringing this suit, the FDIC was attempting to protect commercial lending institutions rather than the federal government." 928 F.2d at 59. The court concluded that the FDIC's legitimate interests in ensuring enforcement of federal banking laws could "be adequately protected if the suit, upon dismissal, is pursued in state court." *Ibid.*[6] The Second Circuit's

[5] In *California Credit Union League* v. *City of Anaheim*, 95 F.3d 30 (9th Cir. 1996), the jurisdictional question appears not to have been raised or noted.

[6] The Second Circuit also followed other courts of appeals in narrowly construing this Court's decision in *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which permitted an Indian Tribe to bring suit to enjoin the enforcement of a state tax notwithstanding the Tax Injunction Act. See 928 F.2d at 60-61 (collecting cases). In *Moe*, the Court construed the more recently enacted 28 U.S.C. 1362, which vests original jurisdiction in the district courts in actions brought by Indian Tribes, and concluded that that provision reflected Congress's intent that the

approach, therefore, assesses whether the federal instrumentality is bringing suit to protect some important governmental interest that warrants resort to federal, rather than state, court.

The First Circuit, on the other hand, has had several occasions to consider whether federal instrumentalities may bring suit by themselves notwithstanding the Tax Injunction Act. In *United States* v. *State Tax Commission, supra,* the court articulated the most restrictive principle (later adopted by the Ninth Circuit) that federal instrumentalities and the United States "stand on different footing as litigants in federal courts seeking to interfere with state taxing schemes." 481 F.2d at 975. The court likened the federal savings and loan associations in that case to "private corporations," and suggested that it was "reasonable, as a prerequisite to by-passing normal state tax collection and litigation channels, that they persuade the Attorney General of the United States, acting on behalf of the Home Loan Bank Board, to join in their claim." *Ibid.*

The First Circuit appeared to restrict the broad sweep of that rule in *Federal Reserve Bank.* In that case, the United States was not a co-plaintiff with the Federal Reserve Bank of Boston in its suit to enjoin state taxes, and the court considered whether that federal instrumentality should be treated differently from "instrumentalities like savings and loan associations." 499 F.2d at 62. In ruling that the Bank *was* different, the court laid stress on the fact that federal reserve banks "are plainly and predominantly fiscal arms of the federal government. Their interests seem indistinguishable from those of the sovereign and there are good reasons to relieve them of any symbolic requirement of joinder with and by the

Tax Injunction Act not be applied to prohibit suits by Indian Tribes to enjoin enforcement of state taxes. See 425 U.S. at 470-475.

United States." *Ibid.* The court concluded that "a state tax affecting one of the twelve federal reserve banks calls directly into question the sovereign interest of the United States." *Id.* at 63.

In *Bank of New England Old Colony, N.A.* v. *Clark,* 986 F.2d 600 (1993), the First Circuit continued to differentiate among federal instrumentalities which asserted that the Tax Injunction Act did not bar suit by them. In that case, the FDIC had been appointed receiver of an insolvent bank that had instituted a suit in state court for a refund of taxes the State of Rhode Island had imposed upon it. Although the FDIC had invoked its authorization under 12 U.S.C. 1819(b)(2)(B), which generally gives the FDIC authority to remove suits from state court to federal court, the district court granted the State's motion to remand pursuant to Section 1341, and the First Circuit affirmed. The court noted that a conflict among the circuits exists as to when a "federal instrumentality" may invoke the exception to the Tax Injunction Act for the "United States and its instrumentalities." 986 F.2d at 602. The court then noted that the First Circuit follows "a flexible test in which 'each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.'" *Id.* at 602-603 (quoting *Federal Reserve Bank,* 499 F.2d at 64). Because "[t]he FDIC's governmental role in this case is minimal" and "the benefit from the refund claim will flow principally to the bank's creditors and depositors, not to the federal treasury," *id.* at 603, the court concluded that the "federal instrumentality" exception to the Tax Injunction Act did not apply and that the suit to enjoin state taxes had properly been remanded to state court. *Ibid.*[7]

[7] In conflict with that decision, the Fifth Circuit held in *FDIC* v. *City of New Iberia,* 921 F.2d 610 (1991), that the FDIC, when appointed receiver of an insolvent federal savings and loan associa-

c. Under any of the approaches adopted by the First, Second, or Ninth Circuits, the district court would lack jurisdiction to consider petitioner's claim as a "federal instrumentality" purportedly exempt from the prohibition of the Tax Injunction Act. First, the United States is not a co-plaintiff in this lawsuit. See *Housing Authority*, 629 F.2d at 1311. Second, no substantial governmental interest is at stake that warrants keeping the suit in federal, as opposed to state, court. See *Bank of New England*, 986 F.2d at 602-603; *FDIC* v. *New York*, 928 F.2d at 59. And finally, the production credit associations at issue are not acting as "arms of the federal government," such that a state tax "call[s] directly into question the sovereign interest of the United States." *Federal Reserve Bank*, 499 F.2d at 62.

Because the court below failed to address an important issue of subject-matter jurisdiction on which substantial conflict exists in the courts of appeals, this Court should consider granting certiorari to determine whether the Tax Injunction Act permits production credit associations as "federal instrumentalities" to challenge in federal court the imposition of state taxes in the absence of the United States as a co-plaintiff.

2. a. As this Court has made clear, while "absent express congressional authorization[] a State cannot tax the United States directly," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 173-175 (1989) (citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), Congress determines whether, and to what ex-

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tion, could maintain in federal district court a suit seeking to enjoin enforcement of a local tax nothwithstanding the Tax Injunction Act. The Fifth Circuit there concluded that 12 U.S.C. 1730(k)(1) (1988) (later codified at 12 U.S.C. 1819(b)(2)), which provides removal power and federal question jurisdiction for cases involving the FSLIC (and the FDIC, as successor to the FSLIC), was sufficient to confer jurisdiction in the district court despite the Tax Injunction Act.

tent, instrumentalities performing federal functions are exempted from state and local taxation. *United States* v. *New Mexico*, 455 U.S. 720, 733-735, 737-738, 743-744 (1982); *Department of Employment*, 385 U.S. at 358, 359-361. Since the original enactment of the Farm Credit Act in 1933, Congress has declared that production credit associations chartered thereunder are federal instrumentalities, and that, as such, their "notes, debentures, bonds, and other such obligations * * * shall be exempt both as to principal and interest from all taxation" except for "surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. A broader exemption was, however, dependent upon continuing stock ownership by a production credit corporation or, later, by an officer of the Farm Credit Administration. *Ibid.*; Pub. L. No. 92-181, § 2.17, 85 Stat. 602. By 1968, the basis for the broader exemption no longer existed, because the federal government did not hold any stock interest in any production credit association. See H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971).

In 1985, Congress passed various technical amendments to 12 U.S.C. 2077 (formerly codified at 12 U.S.C. 2098 (Supp. III 1985)), one of which deleted the no longer effective provisions for the original broader exemption from taxation. Nothing in the history of Section 2077 suggests that Congress intended those technical changes to grant to production credit associations any revived or new immunities. After 1968, no association (as distinguished from the association's obligations) had been entitled to immunity from state or local taxation because the federal government maintained no stock holdings in any of them. The original provisions, therefore, had become surplusage. Had Congress intended to alter the status quo in the 1985 amendments and to revive production credit associations' immunity from taxation by removing the federal stock ownership requirement, it is unlikely that it would have done so by a "technical amendment." See

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative history] * * * while contemplating an important and controversial change in existing law is unlikely.").

It would be particularly implausible to read Section 2077 so as to ascribe to Congress an intent to grant a production credit association a comprehensive immunity from taxation without regard to whether the federal government owned stock in it—an immunity that the associations never have enjoyed. The court below interpreted Congress's technical amendments in 1985 as if Congress had deleted the condition precedent to the broad exemption, namely the federal government's stock ownership, but had not deleted the exemption itself. There is no support in the language of the amendment, or its history, for that extraordinary result.

b. The conclusion that Congress did not intend to confer on production credit associations the broad exemption from tax advocated by respondents is further supported by the statutory context and legislative history of the Farm Credit Act more generally. Congress determined in that Act which of the federally chartered lending institutions within the farm credit system are entitled to comprehensive immunity from taxation and which are not. In addition to production credit associations, the federal farm credit system includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a). With respect to each entity, the Farm Credit Act contains a "taxation" provision. 12 U.S.C. 2023 (farm credit banks), 2077 (production credit associations), 2098 (federal land bank associations), 2134 (banks for cooperatives). For farm credit banks and federal land bank associations, Congress explicitly provided the type of comprehensive immunity that the court of appeals granted to the production credit associations here. For example, under 12 U.S.C. 2023,

> [t]he Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed.

That exemption language is almost identical to that which applies to federal land bank associations in 12 U.S.C. 2098. As to both entities, the exemption language has been largely unchanged since the Farm Credit Act of 1971. See Pub. L. No. 92-181, §§ 1.21, 2.8, 85 Stat. 590, 597.[8]

Banks for cooperatives, by contrast, have been granted only the limited exemption from taxation accorded to production credit associations. 12 U.S.C. 2134. In fact, prior to the 1985 amendments to the Farm Credit Act, banks for cooperatives (like production credit associations) possessed a broad-based exemption from taxation that was contingent upon the United States' stock ownership. See Pub. L. No. 92-181, § 3.13, 85 Stat. 608. That contingent exemption was repealed in 1985 by the same technical amendments that applied to the associations. See Pub. L. No. 99-205, § 205(e)(10), 99 Stat. 1705.

Congress thus "intentionally and purposely" chose to grant an expansive immunity from taxation to farm credit banks and federal land bank associations, while at the same time conferring only a more limited exemption, with respect to their obligations, to production credit associations and banks for cooperatives. Had Congress wished to provide production credit associations with the more

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[8] Section 1.21 of the Farm Credit Act of 1971 addressed the taxation of both federal land banks and federal land bank associations. Section 2.8 referred to the taxation of federal intermediate credit banks. Federal land banks and federal intermediate credit banks were merged and became "farm credit banks" under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 410, 101 Stat. 1637 (1988) (codified at 12 U.S.C. 2011(a)). As part of the 1987 Act, the taxation statutes were redesignated as Section 1.15 and 2.17 for farm credit banks and federal land bank associations, respectively. Pub. L. No. 100-233, § 401, 101 Stat. 1629, 1637.

comprehensive exemption from taxation that it had provided federal credit banks and federal land bank associations, it presumably would have done so expressly as it had elsewhere in the Farm Credit Act. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress, however, did not "write the statute that way." *Russello*, 464 U.S. at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)). The effect of the court of appeals' decision is to grant to respondents a tax exemption equal to or potentially greater than that which Congress explicitly provided to farm credit banks and federal land bank associations (see Pet. App. A11 & n.5). That result alters significantly the extent to which States and localities have been empowered to tax production credit associations since at least 1968. There is no indication in the Farm Credit Act, in Section 2077, or in the legislative history that Congress meant for its 1985 "technical" amendments to have such a sweeping effect.

c. The court of appeals' decision thus incorrectly calls into question the continuing validity of state court decisions holding that production credit associations are liable for state taxes if the federal government does not hold an ownership interest in them. See, *e.g.*, *Columbus Production Credit Ass'n* v. *Bowers*, 180 N.E.2d 1 (Ohio), cert. denied, 371 U.S. 826 (1962); *Woodland Production Credit Ass'n* v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231 (Cal. Dist. Ct. App. 1964).[9] The court of appeals

[9] In other state court decisions, the underlying liability for state taxes had been decided or conceded, and the issue presented addressed collateral issues, such as apportionment or deductibility. See, *e.g.*, *Klamath Production Credit Ass'n* v. *State Tax Comm'n*, 444 P.2d 923 (Or. 1968) (in banc) (determining which State—

reached this unfortunate result, moreover, in a case in which subject-matter jurisdiction was lacking in the federal courts (see pp. 7-14, *supra*). While that lack of subject-matter jurisdiction should, in our view, be dispositive of the case, the failure of the courts below to comply with the strictures of the Tax Injunction Act presents a question that is itself worthy of this Court's consideration—particularly in light of the contrary results that have been reached in other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted. In addition to the question presented in the petition, the parties should be asked to address whether the case should have been dismissed by the district court for lack of subject-matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. 1341.

Respectfully submitted.

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California or Oregon—is the appropriate taxing jurisdiction for apportioning taxes on production credit association); *Production Credit Ass'ns of Lansing* v. *Michigan Dep't of Treasury*, 273 N.W.2d 10 (Mich. 1978) (considering appropriateness of deductions for production credit associations subject to tax); *Farmers Production Credit Ass'n of South Burlington* v. *Vermont*, 481 A.2d 18 (Vt. 1984) (holding production credit association subject to state tax).

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No. 95-1918

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF ARKANSAS
Petitioner,

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, et al.
Respondents.

BRIEF OF THE STATES OF OHIO, CALIFORNIA, IDAHO, IOWA, MARYLAND, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WEST VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

Amicus State of Ohio and the other *amici* States submit this memorandum to express the States' concern regarding new difficulties in exercising their power to tax that are raised by the decision below. Two judges of a three-judge panel of the United States Court of Appeals for the Eighth Circuit affirmed a District Court decision to confer additional immunity from state taxation upon a federally-chartered production credit association ("PCA"). Immunity was granted over and above the immunity expressly provided by Congress in the very enactment that authorizes the chartering of the PCAs. This decision affects Ohio and the other *amici* States directly because they face similar claims by PCAs and by other federally-chartered entities within the Farm Credit System. Traditionally, PCAs in which the government owns no shares have been subject to most State taxes because of the language of the PCA immunity statute. See, e.g., *Woodland Production Credit Ass'n v. Franchise Tax Bd.*, 225 C.A.2d 293, 37 Cal. Rptr. 231 (1964); *Columbus Production Credit Ass'n v. Bowers*, 180 N.E.2d 1 (Ohio 1962).

The Eighth Circuit's decision to immunize PCAs will have an impact upon Ohio's and other States' ability to tax many federally chartered entities. Of particular interest is an entity which, like the PCAs, is chartered within the Farm Credit System under the Agricultural Credit Act of 1987. Ohio is currently defending an action in the United States District Court for the Southern District of Ohio against an "agricultural credit association" ("ACA") which results from a merger of one PCA and three federal land bank

associations.[1] The federal action attempts to bolster a refund claim lodged with the Ohio Department of Taxation claiming over $2 million which the ACA paid corporate franchise tax under the ongoing assumption that, like its PCA predecessor, it was subject to the tax. Other amici face similar challenges by Farm Credit entities.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit proposes a change in the law. For the first time in their 62 year history, PCAs entirely under private ownership are to be exempt from gross receipts and income taxes imposed by a State. Previously, PCAs enjoyed such broad exemption only if the federal government itself owned shares in the institution--because that is the immunity Congress provided by statute. The sudden shift to broad immunity absent all government ownership occurs not by Act of Congress, but by judicial action of the Eighth Circuit.

Arkansas' petition for certiorari should be granted and the decisions below reversed for three closely-related reasons: (i) judicial activism in granting tax immunity injects

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[1] In that case, Ohio has also asserted jurisdiction is barred by the Tax Injunction Act, 28 U.S.C. §1341. Arkansas apparently raised that issue at the District Court level, but the Eighth Circuit decision makes no express mention of whether the PCAs may assert the United States' own exemption from the Tax Injunction Act. Regardless of the status of Farm Credit entities as "federal instrumentalitites," a separate analysis is necessary to determine whether a Farm Credit entity can evade the Tax Injunction Act. See *Housing Authority of Seattle v. Washington Dep't of Revenue*, 629 F.2d 1307, 1310-1311 (9th Cir. 1980); *Federal Reserve Bank of Boston v. Commissioner of Corporations and Taxation*, 499 F.2d 60, 62-64 (1st Cir. 1974); *United States v. State Tax Comm'n*, 481 F.2d 963, 973-75 (1st Cir. 1973).

confusion in the administration of state taxes by preventing reliance on the clear language of the statutes enacted by Congress; (ii) this Court's precedents counsel deference to congressional intent in determining the Supremacy Clause limitations on state taxing power--deference which should be dispositive here because Congress clearly intended that PCAs should not enjoy the immunity conferred by the Eighth Circuit; and (iii) the Eighth Circuit's activist approach to tax immunity disrupts the careful balance that this Court has attempted to strike between the States' sovereign taxing power and the legitimate protection of federal interests through congressional grants of tax immunity.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's Decision Misapplies This Court's Precedents, And Failure To Correct The Error Will Create Substantial Uncertainty In The Administration Of State Tax Laws.

Until the decision by the United States Court of Appeals for the Eighth Circuit, the States were able to determine whether, and to what extent, a federally-chartered bank within the Farm Credit System could be subjected to state taxation. The determination was a relatively simple matter because States could find the scope of immunity by reading the immunity provisions Congress enacted when it authorized the chartering of the Farm Credit institutions. If, however, the Eighth Circuit's decision is allowed to stand, the days of clarity and certainty are over.

This is so because the Eighth Circuit granted two tax

immunities (and possibly more)[2] to production credit associations ("PCAs") over and above the immunities Congress created by statute. Despite the fact Congress immunized only PCA obligations and debentures, the Eighth Circuit decided to immunize PCAs from Arkansas' gross receipts and income taxes as well. In doing so, the court not only declined to be bound by the current language of the statute, but also ignored statutory history clearly showing Congress' determination that PCAs should not enjoy such broad immunity.

The error of the lower courts lies in their interpretation and reliance on *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *M'Culloch*--the first and most famous of the bank immunity cases--likewise involved a claim of immunity by a federally-chartered entity. However, the similarity ends there. *M'Culloch* addressed a situation involving (i) absolute silence by Congress on the entire subject of immunity; (ii) discriminatory taxation against the federally-chartered Second Bank of the United States; and (iii) state taxation of the central federal depository and currency functions of that bank.[3] None of those factors is

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[2] The dissenting opinion below noted that the majority did not make clear the scope of immunity enjoyed by PCAs under its ruling, citing real property taxation as an example. "[T]he effect of this decision may be to exempt PCAs from state and local real property taxes, an exemption broader than *any* Farm Credit institution has enjoyed in the eighty-year history of the System." Pet. App. at A-11, 76 F.3d at 967 (emphasis in original).

[3] The federal functions of the Second Bank of the United States are enumerated in *First Agricultural Nat'l Bank v. State Tax Commission*, 392 U.S. 339, 354 (1968) (Marshall, J., dissenting). These functions included (i) presidential appointment of five out of 25 directors; (ii) government participation in election of other directors as shareholder; and (iii) issuance of currency which was established as legal tender. Clearly, the Second Bank functioned the way Treasury agencies do today. This

present in this case.

Instead, this case concerns federally-chartered PCAs whose chartering as part of the Farm Credit System was authorized by Congress beginning with the Farm Credit Act of 1933. These institutions were originally owned by the federal government but are now owned privately. The dissenting opinion below and the petition set forth the legislative history *in extenso*. Suffice it here to note that Congress never granted any immunity (beyond that of PCA obligations, notes and debentures) that was not conditioned upon ownership of PCA shares by the federal government. Since the federal government no longer owns any PCA shares, Congress intended PCAs should no longer enjoy broad immunity.

Because Congress specifically provided the extent of the immunity granted to PCAs, there was no reason prior to commencement of this case for either PCAs or the States to consider the question of immunity apart from applying the intent of the statute enacted by Congress. Indeed, this is true of all the entities in the Farm Credit System, because Congress comprehensively addressed the scope of immunity

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is a far cry from the private, profit-making lending functions of the PCAs. Compare *Federal Land Bank v. Bd. of County Comm'rs*, 368 U.S. 146, 151-52 (1961) (acknowledging Congress' intent in creating the federal land banks to allow the banks "to make a profit to be distributed to the shareholders in the form of dividends"). See also 12 U.S.C. §2074(c) (permitting distribution of PCA net earnings). Whether PCA earnings are in fact distributed as dividends or instead enjoyed in the form of lower interest rates is immaterial: either way the borrower/shareholders of the PCAs enjoy the profits of the bank's activity.

provided to each of the Farm Credit System entities.[4] By bringing this action, three PCAs broke this long-standing consensus, and they have persuaded the courts below to ignore statutory history as well as their own past practice of paying state taxes. They sought and obtained a brand new grant of immunity not from Congress but from the courts.

The holding of the District Court and Court of Appeals inevitably injects a new uncertainty into States' efforts (i) to administer their tax laws fairly while (ii) observing the legitimate limits on state taxation that are inherent in our federal system of government. From now on, reading the statutory immunity provision will not suffice to determine whether--and to what extent--PCAs (and other federally-chartered entities) should be exempted from State taxes. The States must wonder whether the mere fact of a federal charter will create immunities, and if so, what the scope of those immunities are. If it is allowed to stand, the Eighth Circuit decision would affect all States in which one or more PCAs are still chartered to operate. Moreover, as a result of the Agricultural Credit Act of 1987, a number of former PCAs and other Farm Credit System entities have merged into new entities, and the immunity status of these

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[4] The immunity of all the federally-chartered entities within the Farm Credit System has long been comprehensively addressed by Congress within a single enactment. The most recent is the Agricultural Credit Act of 1987, Pub. L. 100-233, 101 Stat. 1568 (1987). The PCA immunity statute is set forth therein at §2.6 of the Farm Credit Act [12 U.S.C. §2077], 101 Stat. at 1633. Other provisions in the same Act address, for example, immunity of Farm Credit Banks, §1.55 [12 U.S.C. §2023], 101 Stat. at 1629; and the immunity of Federal Land Bank Associations, §2.17 [12 U.S.C. §2098], 101 Stat. at 1637.

entities would in some cases be even more unclear.[5]

If this new uncertainty were somehow a necessary hazard of our federal system, then the Eighth Circuit's decision could perhaps be justified and permitted to stand--but such is not the case. This Court's precedents counsel greater respect than that shown by the Eighth Circuit for Congress' own determination of what immunities may be necessary to preserve the interests of the federal government.

As the discussion below shows, this case presents a classic example of a Court of Appeals decision addressing a question of federal law which "should be settled by this Court" because of its important ramifications for the administration of state tax systems. In addition, it will be shown below that the Eighth Circuit's failure to defer to clear congressional guidance "conflicts with applicable decisions of this Court," Rule 10.1(c). Therefore, certiorari should be granted and the decision below reversed.

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[5] As noted, Ohio is currently defending an action brought by an "agricultural credit association" ("ACA") which is the successor to one PCA and three federal land bank associations. Other *amici* also face refund claims by ACAs. Nowhere does the Agricultural Credit Act of 1987--or the technical corrections act passed in 1988--provide any immunity to the merged entity. Indeed, no statute even acknowledges any alleged federal instrumentality status of ACAs. The status of such merged entities could be clarified by a ruling that courts must look to the statutes as binding on the immunity question.

The Eighth Circuit's Decision Is Plainly Erroneous, Because Congress Intended That PCAs Not Enjoy Immunity From State Gross Receipts And Income Taxes. Under This Court's Decisions, Congress' Intent Should Be Dispositive.

The key flaw in the reasoning of the Eighth Circuit can be found in the following passage in the majority opinion:

> Beginning with *M'Culloch v. State of Maryland*, 4 Wheat. 316 (1819), the Supreme Court has repeatedly held that because of the Supremacy Clause of the United States Constitution, states have no power to tax federally created instrumentalities absent Congressional authorization.

Pet. App. at A-3; 76 F.3d at 963.

The next sentence quotes the following language from *M'Culloch*:

> "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

Pet. App. at A-3; 76 F.3d at 963.

This very language from *M'Culloch* shows the essential error of the Eighth Circuit's immunity analysis: finding immunity based upon "federal instrumentality" status begs the question

whether state taxation in a given instance does or does not "retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress."

This is the question Congress itself considered and resolved in conjunction with authorizing the chartering of PCAs:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. ***Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the***

Farm Credit Administration.[6]

Farm Credit Act of 1971, Pub. L. 92-181, §2.17, 85 Stat. 583, 602 (1971) (formerly codified at 12 U.S.C. §2098, now §2077).

The Farm Credit Amendments Act of 1985 deleted the bold-faced, italicized sentences. As the dissenting opinion below correctly explained:

> This 1985 amendment deleted the express exemption that had been granted to a PCA and its income for so long as the PCA was Government-owned. ... But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption, for which no PCA remained eligible, as the grant of a far broader implied exemption. ...

Pet. App. at A-11; 76 F.3d at 967.

The dissenter, Judge Loken, perceptively went on to note that "normal principles of statutory construction" dictated the opposite of the majority's holding:

> Because PCAs had no exemption from state

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[6] This language from the 1971 statute varies in form but not substance from the language of the original 1933 statutes. See Pub. L. 73-43, §4(c), 48 Stat. 128, 130 (1933). The dissent notes that "[b]y 1968, all PCAs were owned entirely by their borrower-members." Pet. App. at A-10, 76 F.3d at 966.

> and local taxation before the 1985 amendment (other than the exemption for their obligations), they should have no exemption under the statute as amended, 12 U.S.C. §2077. But this court concludes otherwise, adhering--in my view blindly--to "no express waiver" dicta in earlier cases that discussed the implied constitutional immunity. This decision is illogical, and it is contrary to the overriding rule, grounded in constitutional and statutory principles, that defining the extent of federal instrumentality tax immunity is a quintessentially legislative task. ...[7]

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[7] It is important to note that the Eighth Circuit majority relied upon the doctrine that Congress must expressly waive immunity to subject "federal instrumentalities" to state taxation. However, the cases cited in support of the proposition actually suggest a different approach: they apply Congress' intent as manifested in the immunity statutes it enacted. In *Dep't of Employment v. United States*, 385 U.S. 355, 360-61 (1966), this Court held that the National Red Cross was an exempt instrumentality because it functioned "virtually as an arm of the government" and because, as such, it continued to enjoy statutory exemption from federal unemployment compensation, which federal statutes further extended to state taxation. Nothing in *Dep't of Employment* supports the Eighth Circuit's theory that courts should imply immunities beyond those enumerated by Congress in its immunity statutes. Nor do the Eighth Circuit's own decisions in *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. # 1*, 657 F.2d 183, 186 (8th Cir. 1981), aff'd in mem. op., 455 U.S. 995 (1982), or *United States v. City of Adair*, 539 F.2d 1185 (8th Cir. 1976), cert. denied 429 U.S. 1121 (1977) support such a theory, because both of those cases involved broad congressional grants of immunity with narrow exception for real estate taxation. In each case, the court decided that certain assessments simply failed to come within the real estate exception.

In any event, the conditional nature of the exemption clearly implies consent to state taxation once the condition of federal ownership is removed, as found by the California and Ohio decisions cited at page

Pet. App. at A-11 through A-12; 76 F.3d at 967.

This Court's cases show how correct the dissent was. First, the opinions of this Court addressing the immunity of entities within the Farm Credit System have always relied upon the clear language of the statutes passed by Congress. See *Federal Land Bank of Wichita v. Bd. of County Comm'rs*, 368 U.S. 146 (1961); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941).

Second, principles of statutory construction generally give effect to Congress' decision to omit language in one portion of an enactment that is included in other provisions of the same enactment. See *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1593 (1994), citing *Keene Corp. v. United States*, 113 S.Ct. 2035, 2040 (1993) (internal quote marks omitted) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (internal quote marks omitted). This means that Congress, by expressly defining the scope of immunities as to each farm credit entity in the same legislation, intended to withhold any immunity it did not expressly grant.

Finally, this Court has recognized the unique function of Congress in determining whether state taxation in fact interferes with its own legislative purposes:

1, supra. To require such clear implication to be expressed shows insufficient respect for congressional intent.

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

United States v. Detroit, 355 U.S. 466, 474 (1958).

This principle is reflected in decisions of this Court declining to extend immunity or pre-emption under the Supremacy Clause any further than Congress itself provides. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (rejecting argument by an Indian tribe that its off-reservation resort business should be exempt from state taxation) ("Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (considering the extent to which federal laws that require warnings on cigarette labels preempt state law causes of action based on failure to fully disclose the dangers of smoking) ("...Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").[8]

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[8] In *Cipollone*, this Court indicated that applying the principle of statutory construction *expressio unius est exclusio alterius* best accommodated the differing functions of the Congress and the courts. "In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in §5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority", Malone v. White Motor Corp., 435 U.S., at

Just as Congress defined the effect of the Supremacy Clause upon the legislation at issue in *Mescalero Tribe* and *Cipollone*, so too it has defined the scope of PCA immunity here. There is no reason why the courts should reconsider immunities which Congress could have created but decided not to provide. See *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75-76 (1993); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 11-13 (1986). Yet this is precisely what the Eighth Circuit's interpretation of the "federal instrumentality" doctrine would do.

Applying Congress' Immunity Statutes In Accordance With Traditional Principles Of Statutory Construction Respects The Proper Boundary Between Federal And State Sovereignty.

The federal system involves delicate questions concerning the relationship between two sovereigns exercising authority within the same territory. The question of state tax immunity is perhaps the most sensitive of all. It involves limitations upon an essential attribute of the States' sovereignty: the power to tax, which this Court has called "the most basic power of government." *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

The very essential nature of the taxing power has heightened the sensitivity and deference this Court has shown when called upon to interfere with the operation of state tax systems. In rejecting equal protection challenges, for

---

505, 55 L.Ed.2d 613, 107 S.Ct. 683 "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. (cite omitted) Such reasoning is a variant of the familiar principle of expression (sic) unius est exclusio alterius..." 505 U.S. at 517.

example, this Court has stated that "'[t]he States have a very wide discretion in the laying of their taxes.'" *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959). When rebuffing attempts to "end run" state tax procedures, this Court has noted the ordinary reasons for deferring to legal remedies are "of particular force where the suit ... is brought to enjoin the collection of a state tax in courts of a different though paramount sovereignty:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. "

Matthews v. Rodgers, 284 U.S. 521, 525-26 (1932).

Such deference reflects what the Court just last term called "the strong background presumption against interference with state taxation." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S.Ct. 2351, 2356 (1995). These cases recognize that, absent a congressional provision limiting state powers, the very nature of the federal system imposes particular limitations upon the federal judiciary when it is asked to interfere with the administration of state tax systems.

At our nation's inception, this Court found it necessary to protect the infant United States government by judicially implying tax immunity to protect the Second Bank of the United States from discriminatory taxation by States. See *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheaton) 316 (1819), and *Osborn v. Bank of the United States*, 22

U.S. (9 Wheaton) 738 (1824). However, as Congress gained institutional experience in authorizing the chartering of federal entities, Congress increasingly addressed the necessary scope of tax immunity through the enabling legislation. During the course of this development, this Court has placed increasing reliance on Congress' own pronouncements and engaged less and less in judicially determining the need for immunity. Compare *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("...[O]ur job is neither to assess the underlying merits of the program, nor to opine on whether Congress would be wise to exempt Ginnie Maes from state taxation. ... A court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established."); *Smith v. Davis*, 323 U.S. 111, 119 (1944) ("All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of government. That intent, which is largely codified in §3701, should not be expanded or modified in any degree by the judiciary."). This principle also accords with the separation of powers at the federal level and reflects the common sense proposition that Congress--as the body enacting the laws--occupies the best position to determine how to protect its own purposes in doing so.

In light of these fundamental principles, this Court has long since abandoned an earlier willingness to infer tax immunity. One landmark in this development occurred as long ago as *Graves v. People of State of New York*, 306 U.S. 466 (1937). In that case, this Court declined to extend tax immunity to the incomes of employees of the Home Owners' Loan Corporation absent express exemption by Congress. Like the present case, Congress expressly exempted the Corporation's bonds from taxation. Rejecting the claim of a

broader implied immunity, this Court noted:

> [T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.[9]

306 U.S. at 483.

The same policy is reflected in the traditional reluctance of this Court to engage in judge-made constitutional law where careful statutory interpretation settles the matter. See *Jean v Nelson*, 472 U.S. 846, 856-57 (1985); *Gomez v. United States*, 490 U.S. 858, 864 (1989) (It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question. ...

---

[9] The United States is conspicuous by its absence as a plaintiff in this case which purportedly asserts a federal sovereignty interest. That absence can perhaps be understood in light of the ruling by the United States' own taxing authority that PCAs are actually to be regarded as private businesses. See Rev. Rul. 84-109, 1984-2 C.B. 7: "[T]he description of these PCAs as federal instrumentalities does not reflect their true economic function and status and therefore is not determinative for purposes of (the business investment tax credit)." Moreover, it could be regarded as inherently contradictory of the PCAs to seek the benefit both of private business tax credits and government tax immunities.

In this case, such an alternative interpretation of the additional duties clause may be deduced from the context of the overall statutory scheme.")

Likewise, in the present case the issue of the existence and scope of the immunity possessed by PCAs can most clearly and properly be resolved by applying the immunity statutes Congress enacted.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari and reverse the decision of the Eighth Circuit.

Respectfully submitted,

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June 21, 1996

(5)

No. 95-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS

Petitioner,

V.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; AND DELTA PRODUCTION CREDIT ASSOCIATION.

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

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No. 95-1918

STATE OF ARKANSAS

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FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA *et al.*

Respondents.

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RESPONDENTS' BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the subject-matter jurisdiction issue raised by the United States as *amicus curiae*.

STATEMENT

Contrary to the claim of the United States as *amicus*, no current conflict exists between the circuits regarding the application of the federal instrumentality exception to the Tax Injunction Act, 28 U.S.C. 1341, when the United States is not a co-plaintiff. The rule currently applied is that federal instrumentalities may invoke the exception if they are acting in a governmental capacity. Respondents are clearly entitled to invoke the federal instrumentality exception because they are federal instrumentalities engaged in the performance of an important governmental function.

DISCUSSION

The federal instrumentality exception to the Tax Injunction Act was most recently considered in *Simon v. Cebrick*, 53 F.3d 17 (3rd Cir. 1995), a case which is not discussed by *amicus*. *Simon* involved an action by the Federal Deposit Insurance Corporation ("FDIC") to protect its mortgage interest in certain property against a third party's attempt to foreclose real estate tax liens. To determine whether the federal instrumentality exception applied, the Third Circuit considered whether the FDIC was acting in a governmental capacity in protecting its interest in the property. The court concluded that the FDIC was acting in a governmental capacity, stating:

> The district court's application of this section [12 U.S.C. § 1825(b)(2)] to protect the FDIC's lien interest from being foreclosed without its consent does not violate the TIA, even if it were applicable, because the FDIC is acting in a governmental capacity when it winds up the affairs of failed banking institutions pursuant to FIRREA. In light of the governmental role played by the FDIC in the instant case, we find that it qualifies for the federal instrumentality exception to the TIA.

Id. at 23 (bracketed material added).

The Third Circuit's approach to the federal instrumentality exception in Simon is consistent with the approach used by the First, Second and Fifth Circuits. These courts also hold that the applicability of the exception turns on whether the federal agency or instrumentality is performing a governmental function in connection with the activity underlying the law suit.

The First Circuit considered this issue most recently in *Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600 (1st Cir. 1993). The court described the applicable standard as follows:

> [W]e have instituted a flexible test in which 'each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.'

Id. at 602-603 (*quoting Federal Reserve Bank v. Comm'r of Corporations and Taxation*, 499 F.2d 60, 64 (1st Cir. 1974)).[1] The Second Circuit considered this issue in *Federal Deposit Ins. Corp. v. New York*, 928 F.2d 56 (2d Cir. 1991). The court refused to apply the federal instrumentality exception because the FDIC was attempting to protect only the interests of commercial lending institutions, not the federal government. *Id.* at 59. The Fifth Circuit considered this issue most recently in *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991). The court cited with approval the First Circuit standard, and found that the Federal Savings and Loan Insurance Corporation ("FSLIC") and the FDIC were entitled to invoke the federal instrumentality exception in a case involving a tax assessment against property in which they had a direct interest. *Id.* at 613.

---

[1] *Amicus* misdescribes the First Circuit's opinion, claiming that the First Circuit found

> [A] conflict among the circuits exists as to when a 'federal instrumentality' may invoke the exception to the Tax Injunction Act for the 'United States and its instrumentalities.'

(Brief of the U.S. as *amicus* at 13). The First Circuit found no such conflict. It merely observed that

> Courts differ on whether the FDIC qualifies for the exception.

Bank of New England, 986 F.2d at 602.

The rule in these cases is that where the federal agency or instrumentality is found to be performing a governmental role, the federal instrumentality exception applies.[2] Where only private interests are served, the federal instrumentality exception does not apply. It is also instructive that in none of these cases did the court even comment on the presence or absence of the United States as a party.

The only decision which even arguably applies a different analysis from the other circuits is *Housing Authority of Seattle v. Washington*, 629 F.2d 1307 (9th Cir. 1980). In that case, the court held that the federal instrumentality exception could be invoked only if the United States was a party to the lawsuit. However, the court went on to specifically reserve the question of whether the United States must be a party in all cases. *Id.* at 1311.

The continued vitality of the *Housing Authority* decision, even in the Ninth Circuit, is open to question. *See California Credit Union League v. City of Anaheim*, 95 F.3d 30 (9th Cir. 1996) (possible application of the Tax Injunction Act was neither raised nor noted, even though the United States was not a party to the suit). In sum, if there is a conflict in the circuits on the applicability of the federal instrumentality exemption, it exists by virtue of a single Ninth Circuit decision which has been ignored by the other circuits.

Without citation to any authority, *amicus* claims that respondents are not entitled to invoke the federal instrumentality exception. While *amicus* acknowledges that respondents are

[2]A similar analysis has been applied by the federal district courts. *Federal Land Bank of Wichita v. Board of County Commissioners*, 582 F.Supp. 1507 (D. Colo. 1984) (Federal Land Bank was performing a governmental function and could invoke the federal instrumentality exception to the Tax Injunction Act), and *Northeast Federal Credit Union v. Neves*, 664 F.Supp. 640 (D. N.H. 1987) (federal credit union may invoke the federal instrumentality exception to the Tax Injunction Act).

"statutorily defined instrumentalities of the United States" (Brief of the U.S. as *amicus at 2*), *amicus* fundamentally misapprehends the governmental role and function which respondents perform. Both this Court and Congress have repeatedly confirmed that the member institutions of the Farm Credit System perform an important governmental function - the extension of reliable and affordable credit to agricultural borrowers.

In *Federal Land Bank of St. Louis v. Bismarck Lumber*, 314 U.S. 95 (1941), this Court characterized the Federal Land Banks, also member institutions of Farm Credit System, as follows:

> They are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.' *Federal Land Bank v. Priddy*, 295 U.S. 229, 231; *Federal Land Bank v. Gaines*, 290 U.S. 247, 254.

Id. at 102. The governmental function performed by Farm Credit System institutions was reconfirmed in *Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146 (1961). In response to the claim that the Federal Land Banks were engaged in commercial or proprietary activity, this Court stated:

> Legitimate activities of governments are sometimes classified as 'governmental' or 'proprietary'; however, our decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed.

Id. at 150-51.

The Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, further reaffirmed the federal instrumentality

status of respondents. Congress amended Section 2(a) of the Farm Credit Act, 12 U.S.C. § 2071(a), to read as follows:

> Each Production Credit Association shall continue as a federally chartered instrumentality of the United States.

The legislative history of the Agricultural Credit Act of 1987 emphasizes the important governmental function which System institutions continue to perform. The Agricultural Credit Act of 1987 authorized up to $4 billion dollars of federal financial assistance to the System. Farm Credit Act § 6.26(a), 12 U.S.C. 2278b-6. The Senate Report explains the need for this federal financial assistance package:

> Life insurance companies and commercial banks have also experienced [agricultural loan] losses comparable in percentage terms to those of the FCS but the diversified nature of their total loan portfolio limits the effect of these losses on their earnings and net worth. In response to these losses virtually all life insurance companies have suspended their farm loan programs. Similarly many commercial banks are unwilling to take on new customers and farm loan losses have resulted in a significant number of bank failures among small agricultural banks. *This contraction in the number of institutions willing to supply credit to farmers makes it even more important that the FCS remain a viable source of credit to agriculture during good times and bad.*

S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987) (emphasis added).

CONCLUSION

Since their inception and continuing to the present day, respondents and the other members of the Farm Credit System have been repeatedly recognized as federal instrumentalities performing an important governmental function. They are entitled to invoke the federal instrumentality exception to the Tax Injunction Act. The district court was correct in holding that it had jurisdiction in this case. That decision is fully consistent with the current views of other federal courts and does not warrant this Court's review.

Respectfully submitted,

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No. 95-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTAPRODUCTION CREDIT ASSOCIATION

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

VS .

STATE OF ARKANSAS

COMPLAINT FOR DECLARATORY JUDGMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA,Eastern Arkansas Production Credit Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff & Ledbetter, P.A., for their complaint against the State of Arkansas, state:

I

Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Associatlon, and Delta Production Credit Association, are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. They are cooperative credit institutions whose only business is providing those services which are allowed by the Farm Credit Act. These services include primarily making short term and intermediate loans to (a) bona fide farmers and ranchers and farmers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other

such borrowers as specified by the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm related services directly related to their on-farm operating needs. They may also provide technical assistance to borrowers, applicants and members and make available to them, at their option, such financial-related services appropriate to their on-farm and aquatic operations as is permissible under the applicable regulations.

II.

Defendant, the State of Arkansas, by and through the Department of Finance and Administration and the State Treasurer, administers and collects sales and use taxes and income taxes.

III.

This is an action for declaratory judgment pursuant to section 2201 of Title 28 of the United States Code, for the purpose of determining a question of actual controversy concerning the Supremacy Clause of the United States Constitution between the parties as hereinafter more fully appears.

IV.

Venue of this action lies in this court under section 1391(b) of Title 28 of the United States Code.

V.

Jurisdiction of this action is based on section 1331 of Title 28 of the United States Code and Article Six, Clause Two of the Constitution of the United States. The amount in controversy exceeds $10,000, exclusive of interest and costs.

VI.

Plaintiffs, production credit associations, as that term is defined in the Farm Credit Act of 1971 are deemed Federal Instrumentalities pursuant to section 2071(a) of Title 12 of the United States Code. This designation is bestowed by Congress upon production credit associations in recognition of their vital role in providing a readily available source of credit to the agricultural sector of the United States economy.

VII.

Plaintiffs (i) have filed income and sales tax reports and returns required by the Defendant, and (ii) have paid all sales and income tax required by Defendant to be paid for the calendar years 1991, 1992, 1993, and 1994.

VIII.

On May 5, 1994, Plaintiffs requested the Defendant to recognize their status as Federal Instrumentalities and to exempt them from income and sales taxes imposed by the State of Arkansas. Plaintiffs letter to the Department of Finance and Administration is attached hereto as Exhibit "A".

IX.

In response to Plaintiffs request, on May 26, 1994, the Defendant, by and through the Department of Finance and Administration, released Opinion No. 940511 denying Plaintiffs status as Federal Instrumentalities and refusing to acknowledge Plaintiffs' status as exempt entities. The May 26, 1994 Opinion letter is attached hereto as Exhibit "B".

X.

Plaintiffs, as Federal Instrumentalities, are exempt under section 2077 of Title 12 of the United States Code from state and local taxes pursuant to the Supremacy Clause of the United States Constitution, Article Six, Clause Two.

WHEREFORE, Plaintiffs pray that

1. The court (i) enter a declaratory judgment that Plaintiffs are exempt from state and local taxes, (ii) order the State of Arkansas to remove any existing assessments or liens of taxes against the Plaintiffs, and (iii) enjoin the Defendant from further imposing or assessing any taxes upon the Plaintiffs

2. The court grant such other relief as may be proper.

Respectfully Submitted,

Attorney for Plaintiffs
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Little Rock, AR 72201

by:
Mark W. Michols (77097)

(Letterhead omitted in printing)

May 5, 1994

Timothy Leathers, Commissioner of Revenues
Department of Finance and Administration
P.O. Box 1272 Little Rock, Arkansas 72203

Dear Mr. Leathers:

This firm represents Farm Credit Services of Central Arkansas, PCA ("FCS-CA"). FCS-CA is a production credit association chartered by the Farm Credit Administration In accordance with the Farm Credit Act. [illegible]operative credit institution. Its only business is providing those services which are allowed by the Farm Credit Act. These services include primarily making short and intermediate loans to (a) bona fide farmers and ranchers and ranchers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other such borrowers as specified in the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm related services directly related to their on-farm operating needs. It may also provide technical assistance to borrowers, applicants and members and make available to them, at their option, such financially-related services appropriate to their on-farm and aquatic operations as is permissible under the applicable regulations. A copy of its charter is attached as Exhibit A.

FCS-CA is owned by its members. Presently, the capital structure of FCS-CA is found in the Article VIII of its bylaws, a copy of which is attached as Exhibit B.

As of April 1, 1994, FCS-CA had the following capital structure:

Capital	*Shares*
A Common Stock	12,113
B Common Stock	3
C Common Stock	178,397
Participation Certificates Series 1	0
Participation Certificates Series 2	0

Since 1991, FCS-CA has been paying state income and sales and use taxes also, it may have paid taxes under the name of a predecessor organization prior to that time. Copies of its state Income taxes for the years 1991 and 1992 are attached as Exhibits C and D. Additionally, it has been making payments of state sales taxes, a copy of a sample monthly excise tax report is attached as Exhibit E.

FCS-CA believes that all tax payments made by it or its predecessor organizations have been made in error, since a production credit association is a federal instrumentality. Additionally, under state law, FCS-CA is an exempt organization as that term is defined pursuant to A.C.A § 26-51-303.

FCS-CA is Except From State Taxation Due to its Status as a Federal Instrumentality

It has been long undisputed that the United States Constitution prohibits a state from taxing the federal government or any of its instrumentalities unless Congress specifically consents to such taxation. Article IV § 3 cl. 2 of the United States Constitution: *McCulloch v. Maryland,* 17 U.S. 316, 4 Wheat. 316, 4 L.Ed 579 (1918); *Federal Land Bank v. Bismark Lumber Co.,* 314 U.S.357, 63 S.Ct.587.87 L.Ed.. 834 (1941).

As the Court in *Board of Directors v. Reconstruction Finance Corp.,* 170 F.2d 430 (8th Cir. 1948) stated:

> It is familiar law that a State has no power to tax the property of the United States or any of its instrumentalities within its limits without the consent of Congress whether such tax

> be strictly for state purposes or for local and special objects." (Citations omitted.)

By statute, production credit associations are deemed to be instrumentalities of the United States. 12 U.S.C.S. § 2077 (Supp. 1993). This statute states:

> *Each production credit association and its obligations are instrumentalities of the United States* and as such any and all notes, debentures, and other obligations issued by such association shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder." (emphasis added).

This provision has been a part of the Farm Credit Act since the inception of the Act. The purpose of the Production Credit Association and the Farm Credit Act has long been recognized.

> "It is the federal government which created the production credit corporations for the purpose of carrying out a federal object.... Both farm loan associations and production credit associations were created by Congress for the same general purpose, that is, to afford credit to agricultural producers. If the farm loan association is a constitutional federal instrumentality, the production credit association is also, and not merely the farm loan banks, but also the farm loan associations, have been repeatedly held lawful instrumentalities of the federal government".

Southwest Washington Production Cr. Ass'n v. Fender, 150 P. 2d 983 (Wash. 1944).

Nowhere in the Farm Credit Act does Congress consent to a state taxing a production credit association's activities.. As a result of the policies set forth in the Farm Credit Act, numerous courts have held production credit associations to be instrumentalities of the federal government and as such exempt from state and local taxation and other matters. *M.G. West Co. v, Johnson,* 66 P. 2d 1211 (1937). (As an instrumentality, Production Credit Association exempt from state retail sale tax.) *Southwest Washington Production Cr. Ass'n v. Fender, supra.*. (Production Credit Association is exempt from payment of state corporate license fees due to its status as federal instrumentality) *Matter of Sparkman*, 703 F.2d 1097, 1100 (9th Cir. 1983) (Production Credit Association is not liable for punitive damages because it was an instrumentality of the United States Government): *Smith v. Russellville Production Credit Assoc.*, 777 F. 2d 1544 (11th Cir. 1985) (Production Credit Association is federal instrumentality because it fulfills government mission of channelling credit to farmers).

In fact, the Eighth Circuit Court of Appeals has specifically held that a production credit association is a federal instrumentality In the *United States in Rohweder v. Aberdeen Production Credit Assoc.*, 765 F. 2d 109 (8th Cir. 1985) and is not subject to the imposition of punitive damages.

The statutory language denoting production credit associations as federal instrumentalities is similar to the provisions of other federal instrumentalities found in other statutes. 12 U.S.C.S. 2098 (Federal Land Bank Associations); 12 U.S.C.S. 2134 (Bank for Cooperatives); 12 U.S.C.S. 1433 (Federal Home Loan Bank Board); 12 U.S.C.S. 1768 (Federal Credit Unions). While the language of each of these other provisions is slightly different, the underlying congressional intention is clear. It allows these federally chartered institutions to be considered instrumentalities of the federal government. *Federal Reserve Bank v, Metro Center improvement District*, 657 F.2d 183 (8th Cir. 1981). In the *Federal Reserve Bank* case, supra, the Eighth Circuit found that the District Court erred in finding that the

Federal Reserve Bank was not an agency or instrumentality of the federal government for purposes of tax immunity. In the statutes creating the Federal Reserve Bank, Congress failed to specifically declare that the Federal Reserve Bank was a "instrumentality", the statute merely provide an exemption from taxation. 12 U.S.C.S. 531. However, the lack of the congressional declaration did not stop the Court from overturning the lower Court and holding that the Federal Reserve Bank was a federal instrumentality due to the important governmental functions performed by federal reserve banks.

The language of 12 U.S.C.S. 2077 is manifestly clear. Congress had declared production credit associations to be instrumentalities of the government and, as such, the status of FCS-CA is unassailable. Further, Congress has not consented to any taxation of its activities. Accordingly FCS-CA is exempt from all state taxation.

FCS-CA is Exempt From State Income Taxation Due to its Status as an Exempt Organization Under A C.A § 26-51-303

FCS-CA has an additional ground to exempt it from state income taxes. Under Ark. Code Ann. § 26-51-303 provides as follows:

> The following organization shall be exempt from taxation under this act: (8) Labor, agricultural or horticultural organizations, no part of the net earnings of which inures to the benefit of any private stockholder or member.

As set forth above, the capital structure of FCS-CA follows the requirements set forth In the Farm Credit Act. As of April 1, 1994, the capital structure of FCS-CA was composed of two (2) classes of common stock and two (2) series of participation certificates Both classes of common stock, as can be seen from the attached bylaws, are mere evidences of ownership. These evidences of ownership are required as a condition for the ex-

tension of credit. As a cooperative organization, FCS-CA requires that each borrower become a member of FCS-CA. In connection with a borrowing, a borrower is required to purchase stock in an amount equal to two percent (2%) of the loan value not to exceed $1,000. No dividends have been paid upon this stock. The stock merely provides a method of recognizing the voting interest of a member of the cooperative venture.

CONCLUSION

Under the statutory and case authorities, a production credit association is a federal instrumentality and as such is exempt from state taxation. It is also an exempt organization under Arkansas law and is exempt from state income taxation.

Once you have reviewed this letter, I would appreciate the opportunity of discussing the matter further with you or your staff. Obviously, should you have any questions or require any further information, I will be happy to respond to those inquiries.

Sincerely,

/s/ Mark W. Nichols

(Letterhead omitted in printing)

May 26, 1994

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200 West Capitol Ave.
Little Rock, AR 72201

RE: Federal Instrumentality Status of Farm Credit Services of Central Arkansas, PCA (FCS-CA), Delta Production Credit Association (DPCA), Farm Credit Services of Western Arkansas, PCA (FCS-WA) and Eastern Arkansas Production Credit Association (EAPCA)
Opinion No. 940511

Dear Mark:

By your letters of May 5, 1994, you requested an opinion on whether the above-referenced production credit associations are exempt from corporate income and sales tax under either state or federal law. For the reasons discussed below, it is our opinion that a production credit association ("PCA") is not exempt under either federal or state law and that the PCA's listed above are required to report and pay sales tax, corporate income tax, and any other state tax which may apply to its activities within Arkansas.

State Law

Ark. Code Ann. §26-51-303 (8) provides an exemption from income tax for "labor, agricultural, or horticultural organizations, no part of the net earning of which inures to the benefit of any private stockholder or member." This exemption is identical to the Federal exemption of 26 U.S.C.. §§501(c) (5)). Although there are no state income tax regulations covering this

statute, federal regulations allow this exemption to organizations if: 1) the net earnings restrictions are met, and 2) if the objective of the organization is the betterment of the members' conditions, the improvement of the members' products and the improvement of the members' efficiency in their business pursuits. I.R.C. Reg. §1.501(c)(5)l(a)(1). When federal regulations cover a federal statute which is identical to a state statute, we view the federal regulation as an interpretive tool.

The PCA's are authorized to pay patronage refunds as well as dividends to holders of specified classes of stock including private investors.. Clearly the net earnings may inure to the benefit of a member or private stockholder. In addition, the main objectives of a PCA is to make short and intermediate term loans to farmers, ranchers, and other agricultural producers. These objectives do not meet the requirements of the federal regulations.

Federal Law

There are compelling reasons to treat the PCA's as private entities rather than federal instrumentalities:

1) A PCA is owned and operated by the shareholders, e.g. farmers, ranchers, etc.

2) A PCA acts as any other financial institution in making loans, selling stock to investors, and has the power to pay dividends.

3) PCA employees are not federal civil service employees.

4) PCA's are described in legislative history as government sponsored, rather than government owned or controlled (House Report No. 100-295).

5) Revisions to the Farm Credit Act of 1971 created a secondary market for farm mortgages as well as an insurance system similar to FDIC for backing institution securities and encouraging farm loan restructuring.

6) PCA loan rates are competitive with other financial institutions.

7) Federal statutes authorize PCA's to sue and be sued.

8) Loan funds may come from stock purchases, private banks, or other Farm Credit System Banks. Federal funding is available only if appropriated and is expected to be repaid on specified terms.

9) Prior to 1987, §2.17 of the Farm Credit Act of 1971 provided an exemption from tax for PCA income. This exemption was removed by 1987 amendments. 12 U.S.C. §2077.

Although the Eighth Circuit has stated in several cases that it considers PCA's to be federal instrumentalities none of the cases I have located so far are tax cases. Further, the Seventh Circuit recently held that neither a production credit association nor a federal land bank association was a federal instrumentality for reasons similar to those listed above. *Hanna v. Federal Land Bank Ass'n*, 903 F.2d 1159 (7th Cir. 1990). In addition, the Fourth Circuit recently ruled relying upon Hanna that a federal home loan bank was not a federal instrumentality. *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214 (4th cir.. 1993). Because doubt exists as to the entitlement of the PCA' s to an exemption from tax, the request for exemption is denied.

The PCA's have three choices concerning their outstanding corporate and sales tax returns:

1) They may file the returns and pay the tax without protest.

2) They may file the returns and pay the tax under protest. They must then file suit within one year in order to preserve any right to a refund. Ark. Code Ann. §26-18- 406.

3) They may choose not to file returns. If so, they may be assessed delinquent tax and may then request an administrative hearing.

This opinion is based on my understanding of the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules and regulations. Any change in the facts or law could result in a different opinion.

Yours truly,

/s/ Beth B. Carson
Revenue Legal Counsel

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Comes now Tim Leathers, Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Motion to Dismiss Plaintiff's Complaint, as follows:

1. The Court has no subject matter jurisdiction over the matters stated in the complaint and should dismiss this suit pursuant to Fed. R. Civ P. 12(b)(1).
2. Plaintiffs have failed to state any claim upon which relief can be granted and their complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).
3. Plaintiffs' suit is barred by the Tax Injunction Act (28 U.S.C. §1341) and should be dismissed.

WHEREFORE, premises considered, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,

/s/ Beth B. Carson

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UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

Comes now Tim Leathers, Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and presents this, his Brief in Support of Motion to Dismiss Plaintiff's Complaint, as follows:

Facts

1. Plaintiffs are production credit associations, collectively referenced as PCA's, doing business in Arkansas. They voluntarily filed Arkansas corporate income tax returns as well as sales and use tax returns for at least 1991 - 1993. Taxes for periods in 1994 are being paid under protest, although no assessments have been made. By letters dated May 5, 1994, the PCA's filed claims for refund for taxes paid in 1991, 1992 and 1993 pursuant to Ark. Code Ann. §26-18-507. Those claims were denied on May 31, 1994.

2. Also by letter dated May 5, 1994, Plaintiffs requested that the Department of Finance and Administration issue an opinion concerning the tax status of the PCA's. The Department's opinion that PCA's are not exempt from state tax is attached to Plaintiffs' Complaint.

3. Plaintiffs' Complaint requests the following relief:

a. a declaratory judgment that PCA's are exempt from state and local taxes "as Federal Instrumentalities" and "pursuant to the Supremacy Clause;"

b. an injunction to stop the Department from "further imposing or assessing any taxes upon the Plaintiffs;" and,

c. an order requiring the State to "remove any existing assessments or liens of taxes against the Plaintiffs."

SUBJECT MATTER JURISDICTION — DECLARATORY JUDGMENT

4. Declaratory judgment is a form of relief and the Federal Declaratory Judgment Act, 28 U.S.C. §2201, does not confer subject matter jurisdiction. There must be a federal right of entry to federal courts. Plaintiffs allege that this court has jurisdiction under 28 U.S.C. §1331 (federal question). The complaint must show on its face that Plaintiffs' suit arises under the Constitution, laws, or treaties of the United States; however, no substantial federal question is stated in this matter.

5. Plaintiffs seek a declaration that they are not subject to Arkansas income, sales and use tax because they are federal instrumentalities exempt from tax under the Supremacy Clause of the U.S. Constitution. Plaintiffs have alleged no action by the State against them which would give rise to a federal cause of action. What Plaintiffs have really alleged is a possible defense to a state tax assessment, although no assessment has been made. The only possible claims Plaintiffs have against the State of Arkansas are their claims for refund which they may pursue in state court. See Ark. Code Ann. §§26-18-507 and 26-18-406.

6. As the Eighth Circuit stated:

> Thus, when a party seeks access to federal court in a declaratory judgment action, the court must examine the realistic position of the parties. The court may realign the parties, if necessary, to determine whether the declaratory plaintiff affirmatively asserts a federal claim, or seeks in effect, to establish a defense against a cause of action which the declaratory defendant might assert in state court. *Lawrence County S.D. v. State of South Dakota*, 668 F.2d 27, 30 (8th Cir. 1982). See also *Public Service Commission v. Wycoff*, 344 U.S. 237 (1952)

7. The South Dakota case is very similar to case before this court. There, the county filed an action for declaratory judgment against the state seeking a declaration that a federal stat-

ute affecting school funding preempted a state funding statute under the Supremacy Clause. Although the District Court did not consider subject matter jurisdiction, the Eighth Circuit compared the matter to *Wycoff* and, on its own, dismissed the complaint, stating:

> In effect, the county's complaint asserts a defense against a potential claim to the funds by the school districts and special districts. A realistic alignment of the parties would cast the declaratory defendants as claimants of a portion of the funds to which state law entitles them. The school district's claim would be based solely upon violation of the state statute. Lawrence County could then raise its supremacy clause claim defensively. This defensive assertion of the preemption doctrine, however, cannot convert the action into one arising under federal law within the meaning of 28 U.S.C. §1331. 668 F.2d at 31.

8. Other Eighth Circuit cases which support dismissal for lack of jurisdiction include *Home Federal Savings and Loan Assn. v. Insurance Department of Iowa*, 571 F.2d 423 (8th Cir. 1978); *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980); and *First Federal Savings and Loan Assn. v. Anderson*, 681 F.2d 528 (8th Cir. 1982).

9. *Exxon Corp. v. Hunt*, 683 F.2d 69 (3rd Cir. 1982), although not an Eighth Circuit case, does involve a state tax. There, Exxon and others sought a declaratory judgment in District Court that the federal Superfund Act exempted it from New Jersey tax levied on oil for a spill cleanup fund based on preemption. The Third Circuit dismissed the complaint for lack of jurisdiction because no claim arising under federal law was presented.The court stated:

> In summary, a declaratory judgment complaint does not state a cause of action under federal law when the federal issue is in the nature of a defense to a state law claim. Yet that is precisely the situation in

> what is in fact a federal defense to a purely state law enforcement action. *Skelly* and *Wycoff* teach us that under these circumstances federal question jurisdiction is lacking. 683 F.2d at 73.

SUBJECT MATTER JURISDICTION - INJUNCTION

10. Based on the Plaintiffs' Complaint, this court has no equity jurisdiction for purposes of injunctive relief. As stated in *Louis W. Epstein Family Partnership v. Kmart Corp.*, 828 F. Supp. 328 (E.D. Pa. 1933) citing *Younger v. Harris*, 401 U.S. 37 (1971), equity jurisdiction is proper "if the plaintiff has no adequate remedy at law, the threatened injury is real as opposed to imagined, and no of jurisdiction."

11. There is no adequate remedy at law if the injury is of a repeated or continuing character or where monetary damages are difficult to ascertain or are inadequate. 828 F. Supp. at 337. The only "wrong" alleged by Plaintiff is the State's opinion that PCA's are not exempt from state taxes. No assessment has been alleged to have been made by the State so that there is no threatened injury to Plaintiffs and no acts to enjoin. As stated previously, any argument that PCA's are exempt entities may be raised in a state tax refund suit. If PCA's are ultimately determined to be exempt in the state refund action, then the PCA's are entitled to tax refunds with 10% statutory interest. Clearly, the PCA's have an adequate remedy under state law and this court is without jurisdiction to issue an injunction against the State of Arkansas.

FAILURE TO STATE CLAIM

12. Accepting the facts alleged in Plaintiffs' Complaint as true, there is no set of facts which forms a basis for the relief requested. As stated above, there is no claim stated against the State of Arkansas to enforce or redress a federal right. Plaintiffs are merely dissatisfied with the opinion of the Department

of Finance and Administration that they are not exempt from state tax. Plaintiffs have not stated a justifiable issue for purposes of declaratory relief.

13. With respect to Plaintiffs' request for an injunction against future tax assessments, Plaintiffs have not affirmatively alleged:

a) that the State has actually assessed any tax against Plaintiffs or threatened to assess tax against Plaintiffs;

b) that Plaintiffs have no adequate remedy at law;

c) that failure to enjoin future action by the State of Arkansas will result in irreparable harm. In sum, there are no facts stated supporting a basis for this court to issue an injunction against the State of Arkansas.

SUIT BARRED BY TAX INJUNCTION ACT

14. The Tax Injunction Act (28 U.S.C. §1341) prohibits a District Court from issuing an injunction affecting a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State." The Act also prohibits a District Court from issuing a declaratory judgment. *California v. Grace Brethren Church*, 457 U.S. 393 (1092).

15. There should be no dispute that Arkansas law provides a "plain, speedy, and efficient" remedy through either a refund procedure under Ark. Code Ann. §26-18-507 or a protest payment and suit for refund under Ark Code Ann. §26-18-406. See *California v. Grace Brethren Church*, 457 U.S. 393. Because the Tax Injunction Act applies in this case, this court has no jurisdiction over this matter because " the Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantial federal claims from the federal district courts to the state courts..." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 n.19 (1981). In *Exxon Corp. v. Hunt*, discussed above, the Third Circuit also dismissed the case as the Tax Injunction Act imposed a jurisdictional bar.
WHEREFORE, premises considered, Defendant prays that

Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantial federal claims from the federal district courts to the state courts..." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 n.19 (1981). In *Exxon Corp. v. Hunt*, discussed above, the Third Circuit also dismissed the case as the Tax Injunction Act imposed a jurisdictional bar.
WHEREFORE, premises considered, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,
/s/ Beth B. Carson

(Certificate of Service omitted in printing)

FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

PLAINTIFF'S RESPONSE TO DEFENDANT 'S MOTION TO DISMISS

Come now, Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association and Delta Production Credit Association, and present this, their Response to Defendant's Motion to Dismiss Plaintiffs' Complaint, and state:

Defendant asserts three arguments for dismissal for Plaintiffs' Complaint:

(1) lack of subject matter jurisdiction;

(2) failure to state a claim; and,

(3) that the Tax Injunction Act, 28 U.S.C. § 1341, bars this court from hearing Plaintiffs' cause.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

Defendant attacks the court's subject matter jurisdiction on two grounds, both of which lack merit. First, Defendant argues that the Plaintiffs' have not raised a substantial federal question, and that this court lacks jurisdiction because there is no action by the state against Plaintiffs which supports their cause of action.

Defendant's motion to dismiss states that Plaintiffs have alleged "a possible defense to a state tax assessment" and asserts that such an allegation is insufficient grounds for jurisdiction because it is an assertion of an anticipated defense. This is not

a correct statement of the law and Defendant's reliance on *Lawrence County. S.D. v. South Dakota*, 668 F.2d 27 (8th Cir. 1982) for this argument is clearly improper. The Supreme Court in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) summarily dealt with the Eighth Circuit's conclusion in *Lawrence County, S.D. v. South Dakota* that the plaintiff's invocation of the Supremacy Clause did not convert the action into one arising under federal law for purposes of federal jurisdiction under 28 U.S.C. § 133 by stating, "This ruling was erroneous." 469 U.S. at 259 n.6.

In accordance with the Supreme Court's ruling, in 1990, the Eighth Circuit recognized that in previous decisions it had improperly "rejected federal jurisdiction because the preemption claim was in the nature of a defense to a state action." *First Nat. Bank of E. Ark. v. Taylor*, 907 F.2d 775, 776-77 n.3 (8th Cir. 1990) (specifically referring to the rulings in *Lawrence County. S.D. v. South Dakota* and *Home Fed. Savs. & Loan Ass'n v. Insurance Dep't of Iowa*, 571 F.2d 423 (8th Cir. 1978), both of which Defendant cites in support of its argument). In fact, all the cases that the Defendant cites in support of its argument predate the Supreme Court's *Lawrence County* and the Eight Circuit's *First National Bank* opinions which clearly hold that subject matter jurisdiction exists where an affirmative claim of preemption presents a federal question.

The court in *First National Bank* acknowledged that "the Supreme Court has since made clear that a party may apply directly to federal court for relief based on an affirmative claim of preemption. " First Nat. Bank, 907 F.2d at 776-77 n.3 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 459 U.S. 256 (1985) and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)).

The Supreme Court in *Shaw* reaffirmed the general rule as follows:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the

> Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. 463 U.S. at 96 n.14.

Following the correct rule of law announced by the Supreme Court and as later recognized by the Eighth Circuit, this court does have subject matter jurisdiction to hear Plaintiffs' cause of action. Plaintiffs are seeking a declaration of the rights of the parties involved in this controversy based on federal laws and the federal constitution. The Plaintiffs' Complaint states an affirmative claim of preemption: that the action of the state in denying Plaintiffs tax exempt status as federal instrumentalities is preempted by federal laws, 12 U.S.C. § 2071(a), which provides that production credit associations are federal instrumentalities, and 12 U.S.C. § 2077, which provides that federal instrumentalities are tax exempt, and that by virtue of the Supremacy Clause, the federal statutes must prevail. This clearly presents a federal question which this court has jurisdiction to resolve under 28 U.S.C. § 1331.

Second, Defendant attacks this court's subject matter jurisdiction on the basis that the requirements for pleading injunctive relief are not met in Plaintiffs' Complaint. Here, Defendant misinterprets Plaintiffs' request for relief. Plaintiffs are asking that this court declare that they are federal instrumentalities, and as such, that they are exempt from taxation by the State of Arkansas. Once this declaration is made, a court order enjoining the Defendant from future taxation of the Plaintiffs is a necessary consequence of the relief requested. Without such injunction, Plaintiffs would be forced to file another lawsuit when the Defendant attempts future collection or assessment of taxes from the Plaintiffs. It is reasonable for Plaintiffs to expect that Defendant will continue to expect payment of taxes from Plaintiffs because of Defendant's action denying tax exempt status on the basis that it did not consider Plaintiffs to be federal instrumentalities.

II. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant argues that Plaintiffs have not stated a justiciable issue for purposes of declaratory relief. In order for there to be a justiciable controversy, the claim must not be "hypothetical or abstract" and "the controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth* 300 U.S. 227, 240-41 (1937).

The Plaintiffs' cause of action involves a definite controversy concerning action by the state that is violative of federal laws and the Supremacy Clause, the parties possess adverse legal interests, and the issues are not hypothetical or abstract, they are real and concrete.

Defendant argues that there is no set of facts from which the Plaintiffs can base their cause of action; that the state's opinion letter denying Plaintiffs' tax exempt status is insufficient grounds upon which to state a claim. Again, Defendant misunderstands the law. Courts clearly possess the power to grant declaratory relief on the basis of an affirmative allegation of preemption. *Ex Parte Young*, 209 U.S. 123, 163-67 (1908). See also *First Nat. Bank of E. Ark. v. Taylor*, 907 F.2d 775 (8th Cir. 1990) (Arkansas Insurance Department requested the bank cease particular conduct, the bank complied and then brought suit in federal court seeking a declaration that the Department's action was preempted by federal law) and *Potlatch Forests, Inc. v. Hayes.*, 318 F .Supp 1368 (E.D. Ark. 1970) (a "controversy" existed and plaintiff was entitled to have the issue resolved despite the fact that plaintiff had not violated the allegedly invalid Arkansas statute and that he could avoid sanctions by continuing to obey it).

The fact that there is no presently existing assessment against the Plaintiffs does not render invalid their claim for declaratory relief. Defendant has made it clear that it expects Plaintiffs to pay taxes because it does not consider them to be federal in-

strumentalities. This is in direct conflict with federal law, and thus, a federal question is presented. Following the clear rule of law discussed above, Plaintiffs have stated a justiciable issue.

III. THIS SUIT IS NOT BARRED BY THE TAX INJUNCTION ACT

Defendant states in its Motion to Dismiss Plaintiffs' Complaint that this court is prohibited from issuing an injunction affecting a state tax under 28 U.S.C. § 1341. While this is a correct statement of the federal statute, there is a well recognized exception for suits on behalf of federal instrumentalities.

In *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), the Supreme Court stated that the Tax Injunction Act "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction." This exception has been extended to allow a federal instrumentality to sue for an injunction without joining the United States as co-party. The Eight Circuit case of *Federal Reserve Rank of St. Louis v. Metrocentre Improvement Dist. . #1 , Little Rock*, 657 F.2d 183 (8th Cir. 1981) implicitly adopted this extension where, on its own, a federal instrumentality brought suit for declaratory and injunctive relief against a state entity.

See also *Federal Deposit Ins. Corp. v. New Iberia*, 921 F.2d 610 (5th Cir. 1991); *Federal Reserve Rank of Boston v Comm'r of Corps. & Taxation*, 499 F.2d 60 (1974); *Federal - Land of Wichita v. Bd. of County Comm'rs'* , 582 F .Supp 1507 (D.C. Colo. 1984); *National Carriers' Conference Comm'n v. Heffernan*, 440 F .Supp 1280 (D.C. Conn. 1977).

CONCLUSION

Based on the foregoing reasons, the Defendant's Motion to Dismiss Plaintiffs' Complaint should be denied. The Defendant has failed to acquaint itself with changes in the law, which unambiguously show that Plaintiffs, as federal instrumentalities, clearly have a right seek protection in the federal courts based upon the fact that the Defendant's action is in direct conflict with federal laws, and therefore, in violation of the Supremacy Clause of the United States Constitution.

Respectfully Submitted,

Attorney for Plaintiffs

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by:
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff, Ledbetter & Campbell, and respectfully move this Court to enter an Order granting Plaintiffs summary judgment against Defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for cause state the following:

1. Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, are Production Credit Associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971.

2. Plaintiffs, as Production Credit Associations, are federal instrumentalities pursuant to 12 U.S.C. § 2071(a).

3. Federal instrumentalities are exempt from state and local taxes pursuant to 12 U.S.C. § 2077 and Article VI, Clause 2 of the United States Constitution, (the "Supremacy Clause").

4. On June 17, 1994, Plaintiffs filed this suit seeking a declaration that Plaintiffs, as federal instrumentalities, are exempt from state and local income and sales taxation.

5. Defendant, the State of Arkansas, imposed and collected income and sales taxes from Plaintiffs for the calendar years 1991, 1992, 1993, and 1994, and has refused to recog-

nize Plaintiffs' tax exempt status as federal instrumentalities and has correspondingly denied refund of any taxes.

6. Defendant's imposition and collection of income and sales taxes from Plaintiffs, its denial of refund of such taxes and its refusal to recognize Plaintiffs' tax exempt status as federal instrumentalities contravenes federal law and the Supremacy Clause of the United States Constitution.

7. A statement of material facts in which Plaintiffs contend there is no genuine issue to be tried is attached hereto.

WHEREFORE, Plaintiffs pray that an Order be entered granting summary judgment as a matter of law that Plaintiffs are federal instrumentalities exempt from state and local taxation pursuant to Article VI, Clause 2 of the Supremacy Clause of the Federal Constitution and 12 U.S.C. § 2077, and for attorneys fees, costs, and any other equitable relief toward which Plaintiffs may be entitled.

Respectfully Submitted,

Attorneys for Plaintiffs
NICHOLS, WOLFF, LEDBETTER
& CAMPBELL

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas - Credit Production Association, and Delta Production Credit Association, request this Court to rule as a matter of law that Plaintiffs are federal instrumentalities exempt from state income and sales taxes imposed by the Defendant.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

PARTIES

Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. They are cooperative credit institutions whose only business is providing those services which are allowed by the Farm Credit Act.

Defendant, the State of Arkansas, by and through the Department of Finance and Administration and the State Treasurer, administers and collects sales and income taxes.

STATEMENT OF FACTS

Plaintiffs have filed sales tax reports and income tax returns required by the Defendant and have paid all gross receipts and income tax required to be paid for the calendar years 1991, 1992, 1993 and 1994.

On May 5, 1994, Plaintiffs requested the Defendant refund all taxes paid to Defendant in recognition of Plaintiffs' status as federal instrumentalities and exempt them from income and sales taxes imposed by the State of Arkansas. Plaintiffs' letters to the Department of Finance and Administration are attached to the Complaint.

In response, the Defendant, on May 26, 1994, denied Plaintiffs' request for refund and released Opinion No. 940511 denying Plaintiffs' status as federal instrumentalities. The denial of refund letter and the Opinion letter are likewise attached to the Complaint.

Plaintiffs subsequently paid under protest their 1994 gross receipts, 1993 income taxes, and 1994 estimated tax payments required by Defendant On June 17, 1994, Plaintiffs filed this suit seeking a declaration that Plaintiffs are federal instrumentalities exempt from state and local taxation. Plaintiffs request this Court to grant summary judgment because there is no genuine issue of material fact and, therefore, Plaintiffs are entitled to judgment as a matter of law.

LEGAL STANDARD

Summary judgment is proper where the moving party demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322. *See also* Fed. R. Civ. P. 56(c). When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of their pleading, but their response, by affidavits or as otherwise provided in Rule 56, must set forth

specific facts showing that there is a genuine issue for trial. Id. at 324. *See also* Fed. R. Civ. P. 56(e).

LEGAL ARGUMENT

I. PLAINTIFFS ARE FEDERAL INSTRUMENTALITIES OF TRE UNITED STATES

Plaintiffs, as production credit associations, are deemed federal instrumentalities pursuant to the plain language of the following federal statutes:

12 U.S.C. § 2071(a): Each production credit association shall continue as a Federally chartered instrumentality of the United States.

This designation is bestowed by Congress upon production credit associations in recognition of their vital role in providing a readily available source of short and intermediate credit to the agricultural sector of the United States economy. See 12 U.S.C. § 2001.

The Farm Credit System involves three chains of agricultural lending:

(i) long-term farm real estate loans;
(ii) short and intermediate-term production loans; and
(iii) loans to agricultural cooperatives.

The long-term lending activity began in 1916 through various Federal Land Bank Associations ((FLBAs)), which serviced loans.

Short and intermediate production credit began with the formation in 1922 of twelve Federal Intermediate Credit Banks (FICBs). Because the FICB's were not close to the borrowers, Production Credit Associations (PCAs) were established in 1933 to mirror the FLBAs in servicing loans. Also in 1933, twelve district Banks for Cooperatives (BCs), and a National Bank for

Cooperatives, were formed to make loans to agricultural cooperatives.

Through the years, FLBA's and PCA's provided the primary link of credit to the agricultural community. FLBA's made long-term credit available to farmers to purchase land. Production Credit Associations made shorter term credit available for equipment, feed and other productions needs of the agricultural community. Both FLBA's and PCA's are chartered for specific geographic areas and restricted to lending for their respective agricultural lines under the present Farm Credit System. 12 U.S.C. § 2001, et seq.

The status of these Farm Credit System entities as integral parts of the federal government has been consistently upheld by the Supreme Court.

> The federal land banks are constitutionally created .... Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. . . . They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 102 (1941) (quoting Federal Land Bank of St. Louis v. Priddy, 295U.S. 229, 231 (1935)).
>
> The national farm loan associations, the local cooperative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Id.*

In concurring with the Supreme Court's recognition of Farm Credit System entities as federal instrumentalities, the Eighth Circuit has specifically held that production credit associations are federal instrumentalities. *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109, 113 (8th Cir. 1985). Other courts have

also reached this conclusion. See *Matter of Sparkman*, 703 F.2d 1097, 1100-01 (9th Cir. 1983); *Agrivest Partnership v. Central Iowa Prod. Credit Ass'n*, 373 N.W.2d 479, 482 (Iowa 1985); *Southwest Wash. Prod. Credit Ass'n v. Fender*, 150 P.2d 983, 987 (Wash. 1944).

The weight of authority as represented in federal statutes, Supreme Court holdings, the Eighth Circuit and other jurisdictions clearly supports the conclusion that Plaintiffs, as production credit associations organized under and chartered by federal laws, are instrumentalities of the United States.

II. PLAINTIFFS ARE IMMUNE FROM THE TAXES IMPOSED BY TEE STATE OF ARKANSAS

Federal law expressly exempts from taxation the obligations of production credit associations. 12 U.S.C. § 2077 provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt . . . from taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority.

Thus, the obligations of Plaintiffs as production credit associations are exempt from state taxation. While complete immunity from taxation is not expressly provided by statute, it is nevertheless conferred under the Supremacy Clause of the Federal Constitution.

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land. U.S. Const.,,, Art. VI, C1. 2.

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that states were prohibited from taxing a federally chartered bank even though Congress had not specifically provided an exemption from the tax which the state sought to impose. In 1968 the Supreme Court summarized this long-standing doctrine of implied Constitutional immunity for the federal government and its instrumentalities:

> As long ago as 1819 . . . this Court declared unconstitutional a state tax on the bank of the United States since, according to Chief Justice Marshall, this amounted to a "tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."
>
> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created . . . banks. *First Agric. Nat'l Bank* of Berkshire County v. State Tax Comm'n, 392 U.S. 339, 340 (1968) (emphasis added).

Thus, Constitutional immunity of federal instrumentalities from state and local taxation is provided by the Supremacy Clause, and Congressional action is not necessary to invoke immunity, but rather is necessary to restrict, diminish or yield it.

To override the Constitutional immunity to state and local taxation of a federal instrumentality, Congress must take affirmative and express legislative action. Congress has not expressly consented to such taxation of production credit associations (12 U.S.C. § 2077 waives this immunity with regard to surtaxes, estate, inheritance, and gift taxes only). The Eighth Circuit has properly followed this rule as set forth by the Supreme Court.

Congress must express a clear, express, and affirmative desire to waive the immunity from taxation enjoyed by a federal instrumentality. *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982).

Due to the doctrine of implied constitutional immunity, Congressional consent to the taxation of a federal instrumentality must be clear, express and affirmative. *United States v. City of Adair,* 539 F.2d 1185, 1189 (8th Cir. 1976), cert. denied, 429 U.S. 1121 (1977).

Without Congressional-consent, a state lacks the power to tax a federal instrumentality. *Board of Directors of Red River Levee Dist. No. 1 v. Reconstruction Fin. Corp.*, 170 F.2d 430, 431-32 (8th Cir. 1948).

Furthermore, implied revocation of immunity of constitutional immunity cannot be argued:

> There is little scope for the application of that doctrine [silence by implication] to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. *Graves v. New York ex ref. O'Keefe*, 306 U.S. 466, 479-80 (1939) (emphasis added).

CONCLUSION

Based on the foregoing, Defendant lacks the authority to constitutionally tax Plaintiffs. Its denial of refund and corresponding refusal to recognize Plaintiffs as federal instrumentalities exempt from taxation violates the Supremacy Clause of the United States Constitution. Plaintiffs request this Court to grant summary judgment and rule as a matter of law that Plaintiffs are federal instrumentalities immune from state or local taxation imposed by the State of Arkansas.

Respectfully Submitted,
Attorneys for Plaintiffs

NICHOLS, WOLFF, LEDBETTER
& CAMPBELL, P.A.

By: Rufus E. Wolff
Mark W. Nichols

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

RULE 29 STATEMENT OF FACTS

In support of their motion for Summary Judgment, Plaintiffs submit the following statement of facts:

1. Plaintiffs are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. Attached as Exhibits A1 - A4 are the respective charters of each individual Plaintiff and the applicable portions of their bylaws reflecting their incorporation under the Farm Credit Act of 1971.

2. Plaintiffs filed sales tax reports and income tax returns required by the Defendant and have paid all sales and income tax required by Defendant to be paid for the calendar years 1991, 1992 1993, and 1994.

3. On May 5, 1994, Plaintiffs requested Defendant recognize their status as federal instrumentalities pursuant to 12 U.S.C. § 2071(a); exempt them from income and sales taxes imposed by the Defendant pursuant to 12 U.S.C. § 2077 and the Supremacy Clause of the United States Constitution and refund all taxes paid.

4. On May 26, 1994, Defendant formally denied Plaintiffs' request for refund and released Opinion No. 940511 which denied Plaintiffs status as federal instrumentalities in contravention to 12 U.S.C. § 2071(a) and refused to acknowledge Plaintiffs' tax exempt status in contravention of 12 U.S.C. § 2077 and the Supremacy Clause of the United States Constitution.

Respectfully Submitted,

Attorneys for Plaintiffs
NICHOLS, WOLFF, LEDBETTER
& CAMPBELL

(Certificate of Service omitted in printing)

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA
Monroe County, Arkansas

The Farm Credit Administration, in accordance with the Farm Credit Act of 1971, as amended (the Act), hereby charters a production credit association to be known as the Farm Credit Services of Central Arkansas, PCA (the Association). The principal office location of the Association shall be in the City of Brinkley, County of Monroe, State of Arkansas. The Association is a Farm Credit institution and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes said Association to exercise all powers conferred on the Association under the Act and the regulations of the Farm Credit Administration within the following territory:

In the State of Arkansas, the Counties of Arkansas, Bradley, Cleburne, Cleveland Fulton,, Independence, Izard, Jackson, Jefferson, Lawrence, Lonoke, Monroe, Prairie Pulaski, Randolph, Sharp, Stone, White, Woodruff, and all of Lincoln County except that part specified as the Townships of Mill Cre[illegible], Lone Pine, Township 10, South, Range 6, West, and Township 10, South, Range 5, west of Smith Township.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be affixed hereto this 10th day of December 1990. This charter shall be effective January 1, 1991.

FARM CREDIT ADMINISTRATION
McLean, Virginia
Harold B. Steele

Chairman of the Board

Attest

Curtis M. Anderson
Secretary to the Board

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA BYLAWS

N. "Regulatlons"--FCA or the Assistance Board regulations or directives applicable to and binding on this Association.
O. System"--the Farm Credit System.
P. Voting Stockholder"-- Member who has voting rights.

110-REFERENCES TO "BOARD"

All references in these Bylaws to the "Board" shall refer both to the Initial Board sitting as of the Charter Date and to the Permanent Board, unless otherwise indicated or the context otherwise requires.

ARTICLE II--LEGAL STATUS AND AUTHORITIES

200-LEGAL STATUS AND AUTHORITIES

This Association is a cooperative credit institution which is owned by its Members and is federally chartered pursuant to the Act. Subject to the Act and Regulations and under the supervision of the Bank, the Association in its chartered territory possesses and may exercise all lending, participation, and similar authorities granted by statute or regulation, as such statutes and regulations may be amended from time to time, to a production credit association. Without limiting the foregoing, these

authorities include authority to make, guarantee, and participate with other lenders in short- and intermediate- term loans and other financial assistance to (a) bona fide farmers and ranchers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other requirements of such borrowers as specified in the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs. The Association also may provide technical assistance to borrowers, applicants, and Members and make available to them, at their option, such financially related services appropriate to their on-farm and aquatic operations as is determined feasible by the Bank board of directors under applicable Regulations.

ARTICLE III--ELIGIBILITY TO BORROW

300-MEMBERSHIP IN ASSOCIATION

Any person to whom this Association is authorized to extend credit or other services is eligible to apply for a loan or other services from this Association. In the case of a deceased or legally incompetent Member, the executor, administrator, guardian, or other legally authorized representative shall be considered to be the Member for the Members.

FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA POPE COUNTY, ARKANSAS

The Farm Credit Administration, in accordance with the Farm Credit Act of 1971, as amended (the Act), hereby charters a production credit association to be known as the Farm Credit Services of Western Arkansas, PCA (the Association). The principal office location of the Association shall be in the City of Russellville, County of Pope, State of Arkansas. The Association is a Farm Credit institution and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes said Association to exercise all powers conferred on the Association under the Act and the regulations of the Farm Credit Administration within the following territory:

> In the State of Arkansas, the Counties of Baxter, Benton, Boone, Calhoun, Carroll, Clark, Columbia, Conway, Crawford, Dallas, Faulkner, Franklin, Garland, Grant, Hempstead, Hot Spring, Howard, Johnson, Lafayette, Little River, Logan, Madison, Marion, Miller, Montgomery, Nevada, Newton, Ouachita, Perry, Pike, Polk, Pope, Saline, Scott, Searcy, Sebastian, Sevier, Union, Van Buren, Washington, and Yell.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be affixed hereto this 10th day of December 1990. This charter shall be effective January 1, 1991.

CHARTER NO. 7755

FARM CREDIT ADMINISTRATION
McLean, Virginia

Harold B. Steele
Chairman of the Board

Attest

Curtis M. Anderson
Secretary to the Board

L. Member"--a holder of stock or participation certifi cates in the Association who may or may not be a Voting Stockholder.
M. "Permanent Board"--the Board of the Association other than the Initial Board.
N. "Regulations"--FCA or the Assistance Board regula tions or directives applicable to and binding on this Association.
O. "System"--the Farm Credit System.

P. "Voting Stockholder"--a Member who has voting rights.

110-REFERENCES TO "BOARD"

All references in these Bylaws to the "Board" shall refer both to the Initial Board sitting as of the Charter Date and to the Permanent Board, unless otherwise indicated or the context otherwise requires.

ARTICLE II--LEGAL STATUS AND AUTHORITIES

200-LEGAL STATUS AND AUTHORITIES

This Association is a cooperative credit institution which is owned by its Members and is federally chartered pursuant to the Act. Subject to the Act and Regulations and under the supervision of the Bank, the Association in its chartered territory possesses and may exercise all lending, participation, and similar authorities granted by statute or regulation, as such statutes and regulations may be amended from time to time, to a pro-

duction credit association. Without limiting the foregoing, these authorities include authority to make, guarantee, and participate with other lenders in short- and intermediate-term loans and other financial assistance to (a) bona fide farmers and ranchers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other requirements of such borrowers as specified in the Act (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs. The Association also may provide technical assistance to borrowers, applicants, and Members and make available to them, at their option, such financially related services appropriate to their on-farm and aquatic operations as is determined feasible by the Bank board of directors under applicable Regulations.

ARTICLE III--ELIGIBILITY TO BORROW

300-MEMBERSHIP IN ASSOCIATION

EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION CRAIGHEAD COUNTY, ARKANSAS

The Farm Credit Administration, in accordance with the Farm Credit Act of 1971, as amended (the Act), hereby charters a production credit association to be known as the Eastern Arkansas Production Credit Association (the Association). The principal office location of the Association shall be in the City of Jonesboro, County of Craighead, State of Arkansas. The Association is a Farm Credit institution and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes said Association to exercise all powers conferred on the Association under the Act and the regulations of the Farm Credit Administration within the following territory:

In the State of Arkansas, the Counties of Clay, Craighead,, Crittenden, Cross, Greene, Lee, Mississippi, Phillips, Poinsett, and St. Francis, and that part of Desha County lying north of the Arkansas River. In the State of Missouri, the Counties of Carter, Ripley, and Wayne. In the State of Tennessee, that portion of the Counties of Shelby, Tipton, and Lauderdale west of the channel of the Mississippi River as it now flows.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be affixed hereto this 10th day of December 1990. This charter shall be effective January 1, 1991.

CHARTER NO. 7754

FARM CREDIT ADMINISTRATION
McLean, Virginia

Harold B. Steele
Chairman of the Board

Attest

Curtis M. Anderson
Secretary to the Board

EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION BYLAWS

JANUARY 1, 1991

ARTICLE II -- LEGAL STATUS AND AUTHORITIES

200-LEGAL STATUS AND AUTHORITIES

This Association is a cooperative credit institution which is owned by its Members and is federally chartered pursuant to the Act. Subject to the Act and Regulations and under the supervision of the Bank, the Association in its chartered territory possesses and may exercise all lending, participation, and similar authorities granted by statute or regulation, as such statutes and regulations may be amended from time to time, to a production credit association. Without limiting the foregoing, these authorities include authority to make, guarantee, and participate with other lenders in short- and intermediate-term loans and other assistance to (a) bona fide farmers and ranchers and producers or harvesters or aquatic products for agricultural or purposes and other requirements of such borrowers as specified in the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs. The Association also may provide technical assistance toborrowers, applicants, and Members and make available to them, - their option, such financially related services appropriate to their on-farm and aquatic operations as is determined feasible by the bank board of directors under applicable Regulations.

FARM CREDIT ADMINISTRATION

CERTIFICATE OP DISTRICT TO BE SERVED

BY

DELTA PRODUCTION CREDIT ASSOCIATION

WHEREAS the Delta Production Credit Association, with its principal office in the city of Dermott, county of Chicot, State of Arkansas has been organized and chartered under the Farm Credit Act of 1933, approved June 16, 1933; and

WHEREAS the Governor of the Farm Credit Administration is authorized by law to fix the territory within which its operations may be carried on;

Now, THEREFORE, pursuant to the authority vested in me, I, W. I. Myers, do hereby order that such district shall comprise the following territory in the state of Arkansas: All of Chicot county, all of Desha county except that part north of the Arkansas River, all of Drew county east of range line 4 West and all that part of Ashley county east of a line beginning on the north county line of Ashley county at a point midway between range lines 4 and 5; thence south to township line 18 south; thence west to range line 5 along township line 18; thence south along range line 5 to the south line of Ashley County.

In Witness Whereof I have hereunto set my hand and caused the seal of the Farm Credit Administration to be affixed on this 8th day of December, 1993.

W. I. Meyers
Governor of the Farm Credit Administration

ARTICLES OF INCORPORATION
of the
DELTA PRODUCTION CREDIT ASSOCIATION

We, the undersigned, each of whom is a farmer, for the purpose of organizing a production credit association pursuant to Title II of the Farm Credit Act of 1933, approved June 16, 1933, do hereby adopt the following Articles of Incorporation:

First: The name of this corporation shall be Delta Production Credit Association.

Second: The principal office of the corporation is to be located at_____ in the City of Dermott, County of Chicot, State or Ark., and its operations carried on, and its general business conducted, within such territory as may be prescribed by the Governor of the Farm Credit Administration, hereinafter referred to as the Governor.

Third: The general nature of the business of the corporation and the objects and purposes purposed to be transacted, promoted, or carried on by it, which shall also be construed as powers, are as follows; to wit:

(1) To have and exercise all authority and powers, and to do and perform all acts and to transact and conduct all business which legally may be had or done by production credit associations organized and chartered under and in accordance with the Farm Credit Act of 1933, as it exists or may be amended, and to do all other things incident thereto, and necessary and proper in connection therewith, within such territory as may be prescribed by the Governor; and particularly, but without limiting the generality of the foregoing:

(a) To make loans to farmers for general agricultural purposes;

Fourth: The corporate existence of the corporation shall commence on the approval of these Articles of Incorporation by the Governor and shall continue until dissolved in accordance with law.

Fifth: the authorized capital of the corporation shall be $100,000.00, divided into 20,000 shares of the par value of $5.00 each which shall consist of Class A stock and Class B stock in such amounts as may be determined from time to time by the Board of Directors of the corporation, with the approval of the President of the Production Credit Corporation of the district. Said classes of stock shall have the rights, privileges, powers and preferences, and shall be subject to the restrictions, limitations and qualifications, provided therefor in the Farm Credit Act of 1933, as the same now exists or may hereafter be amended, and further as provided in the by-laws of the corporation.

Sixth: The names and places of residence of each of the persons forming the corporation are as follows:

(Names omitted in printing)

Seventh: These Articles of Incorporation may at any time be altered or amended by order of the Governor.

(Signatures omitted in printing)

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S MOTION TO EXTEND TIME FOR FILING RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now John Theis, Acting Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Motion to Extend Time, as follows:

1. On December 22, 1994, Plaintiffs filed a motion for summary judgment. Under Local Court Rule C-10, it appears that a response to this motion is due on or before January 3, 1995. Because of the Christmas holidays, planned vacation, and need for discovery, Defendant's counsel will be unable to adequately provide a response on or before January 3, 1995. (Defendant's counsel will not return to her office until January 3, 1995.)

2. Defendant's counsel has not received notice that the motion is set for hearing; however, Defendant' counsel was notified' of the July 1995 trial setting and the corresponding May 1995 discovery cut- off. Given that this matter is already set for trial and there is pending Defendant's Motion to Dismiss, Defendant respectfully requests that the time for responding to Plaintiff's Motion for Summary Judgment be extended until at least March 31, 1995.

Respectfully submitted,

BETH B. CARSON

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO EXTEND TIME FOR FILING RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff, Ledbetter & Campbell, and for their response to Defendant's Motion to Extend Time for Filing Response to Plaintiffs' Motion for Summary Judgment states as follows:

1. Plaintiffs admit the allegations contained in Paragraph 1.

2. Plaintiffs are without information to admit or deny the allegations contained in Paragraph 2.

3. Pleading further, plaintiffs would have consented to a reasonable extension due to the holiday season; however, no request from the defendant was ever made. Attached hereto is a copy of the correspondence sent by plaintiff after receiving defendant's motion consenting to a two (2) week extension.

4. Defendant's request for a ninety (90) day extension is excessive. Defendant is still collecting all state sales and income taxes during the pendency of this action. No good cause

exists for such an extraordinarily long extension. As such, the Court should limit any extension to the period of time not to exceed two (2) weeks.

WHEREFORE, plaintiffs pray that defendant's Motion to Extend Time for Filing Response to Plaintiffs' Motion for Summary Judgment extending the time for responding until March 31, 1995 be denied; however, plaintiffs would be agreeable to a two (2) week extension; for attorneys fees, costs, and any other equitable relief toward which plaintiffs may be entitled.

Respectfully Submitted,
Attorneys for Plaintiffs
NICHOLS, WOLFF, LEDBETTER
& CAMPBELL

By: Rufuss E. Wolff
Mark W. Nichols

(Certificate of Service omitted in printing)

(Letterhead omitted in printing)

December 30, 1994
Beth B. Carson

Re: Farm Credit Services of Central Arkansas, PCA, *et al.*
v. State of Arkansas USDC NO. LR-C-54-394

Dear Beth:

I have received your letter and Motion dated December 27, 1994. I have checked my messages and I do not believe I received a telephone call from you requesting an extension. Please be advised that the plaintiffs have no objection to a reasonable

extension for you to answer the Motion for Summary Judgement. In fact, we anticipate filling a pleading with the Court alleging that we would consent to an extension of up to two (2) weeks. I note from your Motion, you are requesting a ninety (90) day extension. We cannot agree of such a long extension. As you know, the state still collects the state income and sales tax during the pendency of this action and we do not believe it is fair to grant such an extraordinarily long extension in light of these collection efforts.

Obviously, if the two (2) week extension is acceptable to you, please provide an Order which I will be happy to sign. If not, I will assume the Court would want a hearing on your Motion.

Should you have any questions, please do not hesitate to contact me.

Sincerely yours,

Mark W. Nichols

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

ORDER GRANTING EXTENSION OF TIME

After reviewing the request of the Defendant to extend the time to file its response to Plaintiff's Motion for summary judgment, the Court finds that Defendant's time for response is extended until January 24, 1995.

IT IS SO ORDERED.

Judge Henry Woods
Dated this 9 day of, January, 1995

PREPARED AND SUBMITTED BY:
Beth B. Carson

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now John H. Theis, Acting Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Response to Plaintiffs' Motion for Summary Judgment, as follows:

1. Plaintiffs have failed to support their motion with admissible evidence.
2. There are issues of material fact remaining.
3. Plaintiffs have failed to establish that they as production credit associations are immune from state taxation as federal instrumentalities.
4. Even if production credit associations are considered federal instrumentalities, any tax immunity has been waived by Congress.

WHEREFORE, premises considered, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,

Beth B. Carson

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S BRIEF IN SUPPORT OF RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now John H. Theis, Acting Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Brief in Response to Plaintiffs' Motion for Summary Judgment, as follows:

A. DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION APPROPRIATE

Defendant again urges the court to dismiss this case for the grounds stated in Defendants Motion to Dismiss, i.e. lack of jurisdiction and failure to state a claim. As stated previously, Plaintiffs have failed to state a federal question for this court to decide. (Diversity is not a basis for jurisdiction because of 12 U.S.C. §2258.) The fact that the Plaintiffs are federally chartered by the Farm Credit Administration is also insufficient to raise a federal question. See 28 U.S.C. §1349 and 28 U.S.C. §451.

B. EVIDENTIARY OBJECTIONS

Defendant does not object to the representations contained in Plaintiffs' Statement of Facts; however, Defendant objects to the inclusion of only a portion of Plaintiffs' bylaws as those portions do not accurately reflect the corporate structure and duties of the Plaintiff production credit associations. Further, Defendant objects to the inclusion in the record of the charters and portions of bylaws as those documents have not been properly authenticated by affidavit or other certification based on personal knowledge. Defendant requests that the Court rule these documents inadmissible for purposes of Plaintiffs' motion. Finally, Plaintiffs have failed to support the facts contained in their motion by affidavit.

III. ISSUES OF MATERIAL FACT REMAINS

The fact that Plaintiffs were federally chartered and are referenced in a code section as federal instrumentalities does not automatically confer immunity from state taxation on them. There are genuine issues of material fact remaining that relate to whether for state taxation purposes Plaintiffs should be considered federal instrumentalities. Those issues are:

1. The specific functions performed by each Plaintiff and whether those functions are governmental functions or related to a governmental interest.
2. The control, if any, exercised by the United States through the Farm Credit Administration over Plaintiffs' operations and policy.
3. The nature of the ownership of Plaintiffs, e.g. whether stock issued by Plaintiffs is owned by individual investors or the United States Government.
4. Whether Plaintiffs' employees are treated as federal employees for purposes of hiring, benefits, termination, or other purposes.

IV. PRODUCTION CREDIT ASSOCIATIONS AS FEDERAL INSTRUMENTALITIES?

Plaintiffs have failed to establish that they (production credit associations) are immune from state taxation. The mere fact that 12 U.S.C. §2077 describes production credit associations as "federally chartered instrumentalities of the United States" does not end the inquiry. Whether a particular entity is entitled to immunity based on federal instrumentality status depends upon the action being taken against the entity. An entity may be immune for one purpose but not for another.[1] Several courts have determined that a federal land bank, which is an entity more tied to the Farm Credit Association that production credit associations, is not a governmental agency for various purposes including the Fifth Amendment. *DeLaigle v. Federal Land Bank of Columbia*, 568 F. Supp.

[1] *Hanna v. Federal Lank Bank Ass'n of S. Illinois*, 903 F.2d 1159 (7th Cir. 1990) held that production credit associations and federal land bank associations were not federal agencies for purposes of an employment discrimination action. This conclusion was based on Congress' intention that these entities be farmerowned and operated agencies rather than federal instrumentalities. *South Central Iowa Production Credit Ass'n v. Scanlan,*, 380 N.W.2d 699 (Iowa 1986) held that production credit associations were not federal instrumentalities for purposes of the Federal Tort Claims Act.

1432 (S.D. Ga. 1983) and cases cited within refused to "immunize" a federal land bank for these reasons:

> This Court finds the rationale of the *Cotton* court persuasive.[2] Without belaboring ground already covered by the *Cotton* court, this Court notes two additional points. First, even though Federal land banks are "federally chartered instrumentalities of the United States" pursuant to 12 U.S.C. §2011 (1976), the Congressional policy behind the Farm Credit Act of 1971, as stated in 12 U.S.C. §2001, establishes that Congress recognized that the Farm Credit System was to be "farmer owned" rather than owned by the federal government.
>
> Second, the former Fifth Circuit in *Roberts v. Cameron Brown Co.*, 556 F.2d 356 (5th Cir. 1977), stated that "[t]he government must be involved with the activity that causes the injury, ... and it is not enough to show that the government heavily regulates the private company whose activities are challenged." ... The Court concludes that the admittedly heavy regulation of federal land banks does not transform these entities into governmental agencies.

For state taxation purposes, even an otherwise private entity may be treated as a federal instrumentality; however, it depends upon the facts and circumstances of the entity's operations. In *Department of Employment v. United States*, 385 U.S. 355 (1966), Colorado attempted to collect state unemployment taxes from the American Red Cross. There, the U.S. Supreme Court

[2] In Federal Land Bank of Columbia v. Cotton, 410 F. Supp. 169 (N.D. Ga. 1976), the court applied the definition of "agency" in 28 U.S.C. §451 to conclude that a federal land bank, although chartered by the federal government, was not a federal "agency."

viewed the American Red Cross as "so closely related to governmental activity as to become a tax-immune instrumentality." The Court based its conclusion on the following: Congress chartered the original Red Cross in 1905; the Red Cross was subject to governmental supervision and audit; the principal officer and other officers in the agency are appointed by the President; the Red Cross was obligated by statute and Executive Order to comply with Geneva Conventions, to assist armed forces and to provide disaster relief to the states; the Red Cross received substantial federal government assistance; it was viewed as an arm of the government by Congress and the President. More importantly, the Red Cross had been specifically exempted from unemployment taxes and congressional reports specifically referenced its continuing exemption despite amendments to the relevant statutes.

A recent U.S. Supreme Court decision, *United States v. New Mexico*, 455 U.S. 720 (1982) summarizes the Court's view of federal immunity from state taxation. Although that case dealt with the taxation of a federal contractor, the discussion is helpful. Quoting from previous decisions, the Court stated:

> '[I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non- discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' 455 U.S. 720,732.

The Court formulated a basic rule for state taxation:

> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, of on an agency or instrumentality so

> closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.[3] ... to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." 455 U.S. 720, 735-736.

In this case, there is no admissible, credible evidence presented by Plaintiffs concerning the operations of each Plaintiff upon which this Court may make a determination whether each Plaintiff is "so closely connected to the Government."

From Congressional records and a review of applicable laws, it is clear, however, that Congress did not intend for production credit associations to be viewed as equivalent to the Government and consequently treated as federal instrumentalities for state taxation purposes. In House Report No. 100-295, production credit associations are described not as Government owned or controlled, but rather Government sponsored. Farm Credit System debt is not guaranteed by the Federal government nor do production credit associations receive no-strings-attached federal funding. Although the stated objective of the Farm Credit Act is to promote the accessibility of credit to rural farmers, the method of achieving this goal is to permit farmers and ranchers to participate in the management, control and ownership of production credit associations.

12 U.S.C. §§2071 - 2077 describe the organization and powers of production credit associations. The organization is voluntary and is achieved by 10 or more farmers (or ranchers) filing articles of association with the Farm Credit Administration. The farmers agree to become stockholders of the production credit association in exchange for loans. Each production credit association elects its board of directors. Although regu-

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[3] This standard was also stated in *United States v. California*, 123 L.Ed2d 528 (1993).

lated by the Farm Credit Administration, a production credit association has the power to sue and be sued, make contracts, hold property, operate under the board of directors, invest funds, borrow money from any institution, issue various classes of stock, prepare bylaws, and offer other financial related services to farmers including issuing insurance.[4] (If Plaintiffs provide the Court with complete copies of their bylaws, the Court will see that Plaintiffs are authorized to issue and sell a class of preferred stock for investors in addition to the classes of stock issued and sold to farmers.) Subject to the bylaws, a production credit association may also pay patronage dividends out of net earnings.

In conclusion, a production credit association is no more closely related to the federal Government than any other federally chartered and regulated financial institution. Production credit associations are equivalent to privately owned credit institutions and should not be afforded immunity from state sales, use and income tax liability.

V. IMMUNITY FROM STATE TAXATION CLEARLY WAIVED BY CONGRESS

Even if this court concludes that production credit associations should be viewed as federal instrumentalities legislative history and a reasonable reading of the law establish that these associations are not immune from state taxation. Prior to 1987, 12 U.S.C. §2077 (§2.17 of the Farm Credit Act of 1971) read as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other ob-

[4] *Commissioner of Insurance v. Jackson Production Credit Association*, 377 So.2d 1047 (Miss. 1979).

> ligations issued by such association shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (cite omitted) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

This specific exemption from state taxes for production credit associations was similar to exemptions for federal land banks (12 U.S.C. §2098), farm credit banks (12 U.S.C. §2023) and banks for cooperatives (12 U.S.C. §2134). The notable difference was that the exemption from state taxation only applied when the Governor of the Farm Credit Administration held the stock of the production credit association. Otherwise, even before 1987, production credit associations were subject to state taxation.

Section 2.17 of the Farm Credit Act of 1971 (12 U.S.C. §2077) was amended in 1987 by the Agricultural Credit Act to remove the underlined portions leaving the unmistakable conclusion that as of 1987, production credit associations were

subject to state taxation. References to the Governor of the Farm Credit Administration have been removed from the statutes governing production credit associations by Pub. L. 100-233.

The conclusion that production credit associations are subject to state taxation is bolstered by 12 U.S.C. §2214 which reads as follows:

> State and other laws shall apply to corporations organized pursuant to this part to the same extent such laws would apply to the organizing banks engaged in the same activity in the same jurisdiction; provided however, that to the extent that sections 2023, 2098, and 2134 of this title may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect to franchise taxes, shall not extend to corporations organized pursuant to this part.

The corporations referenced in this section are service organized by a Farm Credit System bank or banks to service other banks. These service corporations are federally chartered and are described by 12 U.S.C. §2211 as federally chartered and an instrumentality of the United States; however, regardless of this designation, these corporations are subject to state taxation.

Even though 12 U.S.C.§2077 does not specifically state that production credit associations are taxable, *Graves v. N.Y.*, 306 U.S. 466 (1939) offers:

> Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for

> implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity. 306 U.S. 466, 480.

In conclusion, immunity from state taxation for production credit associations is not express or implied, and consequently must be denied.

WHEREFORE, premises considered, Defendant prays that Plaintiffs' motion for summary judgment be dismissed.

Respectfully submitted,

Beth B. Carson

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff, Ledbetter & Campbell, and respectfully submit their Reply to Defendant's Response to Plaintiffs ' Motion for Summary Judgment, and state:

I. SUBJECT MATTER JURISDICTION AND SUFFICIENCY OF CLAIM

Plaintiffs' have stated a federal question based on affirmative federal preemption of action taken by Defendant. Defendant has refused to recognize Plaintiffs as federal instrumentalities in contravention to federal statutes (12 U.S.C. §§ 2071 and 2077) and denied Plaintiffs' tax exempts status in contravention to the Supremacy Clause of the United States Constitution. Plaintiffs have sought a declaration of the rights of the parties involved based on federal laws and the federal constitution. This clearly presents a claim for relief based upon a federal question which this Court has jurisdiction to resolve under 28 U.S.C. §1331.

II. EVIDENTIARY MATTERS

Defendant argues that Plaintiffs did not support the facts contained in their Motion for Summary Judgment with affidavits. Because this reference is not specific, Plaintiffs do not know what particular facts to which Defendant refers. However, Rule 56(a) of the Federal Rules of Civil Procedure provides that motion for summary judgment may be made with or without affidavits. Thus, Defendant's general reference is not sufficient to defeat Plaintiffs' Motion.

Defendant questions the inclusion of only portions of Plaintiffs Bylaws attached to their Rule 29 Statement of Facts. Plaintiffs are relying on a portion of the By laws only to show that they were federally chartered.. The rest of Plaintiffs' Bylaws are irrelevant for support of their Motion and need not be attached.

Rather than raise questions concerning immaterial matters, Defendant is required to meet proof with proof to defeat Plaintiffs' Motion. Mere allegations of factual issues are insufficient to show that a genuine issue of fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Defendant relied on Plaintiffs' bylaws when denying tax refund and federal instrumentality status, as such, they are in possession of those Bylaws but did not offer them as proof in their Response, which F.R.C.P. 56(e) requires. Defendant failed to put forth facts showing the existence of a factual issue, and therefore, failed to carry its burden for purposes of defeating Plaintiffs' Motion for Summary Judgment.

III. AS A MATTER OF LAW PLAINTIFFS' STATUS AS FEDERAL INSTRUMENTALITIES IS NOT OPEN TO FACTUAL INQUIRY

In its response, Defendant argues that certain facts are necessary to determine Plaintiffs' status as federal instrumentalities. This case involves one question. Whether plaintiffs are federal instrumentalities is a question of law. Once Plaintiffs are found to be federal instrumentalities, they are exempt from state sales and income taxation.

Federal instrumentality status is conferred upon an entity in one of two ways: (1) where no statute exists conferring such status but the entity and the government are so closely connected that federal instrumentality status is deemed proper, see *Department of Employment v. United States*, 385 U.S. 355 (1966); *United States v. City of Adair*,, 539 F.2d 1185 (8th Cir. 1976), and (2) where congress has expressly conferred such status by legislation. See *Slotten v. Hoffman*, 999 F.2d 333 (8th Cir. 199?); Rohweder v. Aberdeen Prod. Credit Ass'n, 765 F.2d 109 (8th Cir. 1985); *Schlake v. Beatrice Prod. Credit A.ss'n*, 596 F.2d 278 (8th Cir. 1979); *FederaL Reserve Bank of St. Louis v Metrocentre Improvement Dist. #1*, 657 F.2d 183 (8th Cir. 1981). This case involves the latter.

Plaintiffs are federal instrumentalities pursuant to the express language of the following statutes:

> *12 U.S.C. §2071(a)*: Each production credit association shall continue as a Federally chartered in-

strumentality of the United States.

> 12 U.S.C. §2077: Each production credit association and its obligations are instrumentalities of the united States.

Since Congress specifically deemed Production Credit Associations to be federal instrumentalities, no fact inquiry into the nature of Plaintiffs is warranted. *Slotten,* 999 F.2d at 335 (holding that federal land bank as federal instrumentality was entitled to official immunity in tort action), *Rohweder*, 765 F.2d at 113 (holding that production credit associations as federal instrumentalities are not liable for punitive damages), and *Schlake*, 596 F.2d at 281 (stating that Congress had declared production credit associations to be federal instrumentalities). Additionally, the Eighth Circuit has specifically rejected the Defendant's argument that the closeness of the connection between the entity claiming federal instrumentality status and the federal government is a proper focus of the inquiry. *Metrocentre Improvement Dist.*, 657 F.2d at 185.

Defendant failed to cite one single Eighth Circuit case in support of its argument that a factual inquiry is necessary for determination of Plaintiffs' status. Not only does the Defendant ask the Court to disregard federal statutes that confer instrumentality status upon Plaintiffs, it also attempts to persuade the Court with reasoning that is not controlling and which the Eighth Circuit has refused to recognize.

IV. THE ISSUE OF LAW IN THIS CASE IS SETTLED

It is undisputed that federal instrumentalities are immune from state taxation unless Congress clearly, expressly, and affirmatively consents to such taxation. This rule, implied from the Supremacy Clause of the United States Constitution, was first laid down by the Supreme Court in *McCulloch v. Maryland*. 17 U.S. 316 (1819) and was subsequently reaffirmed in *Osborn v. Bank of* U.S., 22 U.S. 738 (1824), *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928), and *Mayo v. United States*, 319 u.S. 441 (1943). The Eighth Circuit has consistently followed this rule. See *United States v. City of Adair,* 539 F.2d 1185, 1189 (8th Cir. 1976); Metrocentre Improvement Dist., 657 F.2d at 186; Board or *Directors of Red River Levee v. Reconstruction Finance Corp.*, 170 F.2d 430, 431 (8th Cir. 1948).

In its argument, Defendant asserts that Plaintiffs are subject to state taxation upon three grounds:

1. Congress has not provided immunity;
2. Legislative history and a reasonable reading of the law establish consent to taxation; and
3. 12 U.S.C. §2214.

Based on the rule of implied constitutional immunity for federal instrumentalities, none of the proffered bases are persuasive.

First, Defendant argues that immunity from taxation must be expressly provided. Defendant's flawed argument is that because Congress has not expressly provided for immunity of Production Credit Associations from state sales and income taxes, it must follow that Congress impliedly waived such immunity.

This reasoning is incorrect. The Supreme Court in *McCulloch, Osborn, Shaw*, and *May, supra*, specifically held that constitutional immunity is implied. The rule of law requires that waiver of governmental immunity be express; an implied waiver is not effective. Defendant offers no controlling authority in support of its position while Plaintiffs have cited numerous cases in support of the correct rule of law.

Defendant attempts to confuse the issue by citing cases which refuse to extend federal instrumentality immunity to employees or contractors of the government. These cases are clearly

distinguishable.

Defendant cites *Graves v. New York ex rel O'Keefe*, 306 U.S. 466 (1939), where the Supreme Court held that a federal employee was not immune from state wage taxes. In reaching this conclusion, the Court distinguished between state taxation of a federal employee's salary and state taxation of the federal instrumentality itself, its property, or its income. The Court reasoned that the tax on wages was not paid by the corporation from its own funds. Id. at 480. This reasoning is the basis for the underlying policy of the doctrine of implied immunity of federal instrumentalities from state taxation. Where the tax places no burden on the federal instrumentality itself, then immunity from taxation is not implied. However, when the tax is upon the instrumentality itself and paid out of its funds, the tax is a burden and the implied restriction upon the taxing government controls. Id

Defendant also cites, *United States v. New Mexico*, 455 U.S. 720, 735 (1991). This case involved tax immunity of a federal contractor, and the discussion of the doctrine of constitutional immunity must be read in light of that fact. The contractor at issue did not have federal instrumentality status conferred by statute, it merely entered into contracts with the federal government. Therefore, the Court had to determine for itself the closeness of the connection between the contractor and the government for purposes of deciding the issue of tax immunity. Id. at 738.

Next, the Defendant argues that the legislative history and a "reasonable" reading of the statute show that immunity was not waived by Congress. Defendant bases this argument on the 1987 amendment to 12 U.S.C. §2077, which removed language providing for immunity of income from state taxation only to the extent that the Associations were owned by the Board of Governors. If it was the intent of Congress in its 1987 amendment to waive Production Credit Associations' tax immunity it could have done so through express legislation at that time. Without more, however, the mere deletion of part of the statute

does not constitute consent to taxation under the rule that congressional consent must be clear, express, and affirmative. Moreover, since the statue is clear, there is no need to consider speculative legislative history.

As for the reasonable reading part of Defendant's argument, again applying the rule of implied constitutional immunity, the fact that the language of the statue does not clearly, expressly, and affirmatively provide for state income and sales taxation of Production Credit Associations establishes that waiver of immunity was not conferred. A more reasonable reading of § 2077 shows that Congress provided for the outer limits of taxation of such entities by providing that the notes, debentures, and other obligations issued by each Production Credit Association are exempt from all federal and state taxation, except for surtaxes, estate, inheritance, and gift taxes. That the statute does not expressly address state taxation of income or sales tax means that Congress has not waived immunity to such taxation.

Lastly, Defendant cites 12 U.S.C. §2214 in support of its argument. This statute provides that service corporations organized by a Farm Credit System bank are subject to state taxation.

Rather than supporting its position, §2214 actually is an excellent example of how the rule of implied constitutional immunity works. Without §2214, states would lack authority to tax such corporations because they are federal instrumentalities, but because Congress provided for taxation through clear, express, and affirmative legislation (§2214), the states may constitutionally impose a tax on a federal instrumentality. Without this clear, express, and affirmative congressional legislation consenting to state income and sales taxation of Production Credit Associations, Defendant lacks such authority to tax.

CONCLUSION

Based on the foregoing, Defendant has not offered any evidence showing that there is a material issue of fact. The only issue involved is whether Production Credit Associations are federal instrumentalities. This is a question of law. Congress has deemed them to be federal instrumentalities and it has not waived the immunity which flows from this status with clear, express, and affirmative legislation. Therefore, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully Submitted,

Attorneys for Plaintiff

NICHOLS, WOLFF, LEDBETTER & CAMPBELL, P.A.

Mark W. Nichols
Rufus E. Wolff

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

PLAINTIFFS

V. No. LR-C-94-394

STATE OF ARKANSAS

DEFENDANT

ORDER

Plaintiffs are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. In this lawsuit, plaintiffs seek declaratory judgment that they are exempt from state and local taxes and an injunction barring the State of Arkansas from imposing, assessing, or collecting taxes from them.

The defendant State of Arkansas has moved to dismiss the complaint for want of subject matter jurisdiction, for failure to state a claim and because the suit is barred by the Tax Injunction Act, 28 U.S.C. § 1341.

This Court does have subject matter jurisdiction to hear a claim for injunctive relief from a state regulation on the ground that the regulation is preempted by federal law. *Shaw v. Delta Air Lines. Inc.*, 463 U.S. 85 (1983). The complaint in this case does state a claim upon which relief can be granted. Plaintiffs

have been denied tax exempt status by the State of Arkansas. They need not wait until taxes are assessed against them to apply to this Court for relief.

The United States Supreme Court has squarely held that the Tax Injunction Act does not apply to "suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). The Motion to Dismiss is without merit, and is denied.

The plaintiffs have moved for summary judgment on the ground that they are federal instrumentalities and, as such, enjoy immunity from state and local taxation. There can be no serious dispute that the plaintiffs are federal instrumentalities. In at least three places in the United States Code, production credit associations are expressly referred to as "federal instrumentalities":

> 12 U.S.C. § 2071(a): "Each production credit association shall continue as a Federally chartered instrumentality of the United States."
>
> 12 U.S.C. § 2071(b)(7): "On approval of the proposed articles . . . the [production credit] association shall become as of such date a federally chartered body corporate and an instrumentality of the United States."
>
> 12 U.S.C. § 2077: "Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation . . . imposed by the United States or any State...."

Furthermore, the Court of Appeals for the Eighth Circuit has

specifically held production credit associations to be instrumentalities of the United States. *Rohweder v. Aberdeen Production Credit Association*, 765 F.2d 109 (1985).

The defendant argues that even if the plaintiffs are instrumentalities of the United States, that finding does not end the inquiry into plaintiffs' status as tax exempt. Defendant contends that the plaintiffs must demonstrate that they are federal instrumentalities for purposes of state taxation exemption. The defendant also argues that the plaintiffs' immunity from state taxation has been waived by Congress.

The defendant has failed to meet the plaintiffs' evidence that they are federal instrumentalities. Although the defendant complains that the plaintiffs included only some of their bylaws in support of the motion for summary judgment, the defendant has failed to offer other bylaws, or any other evidence, to indicate that the plaintiffs are not federal instrumentalities.

The defendant's argument that the plaintiffs must prove they are federal instrumentalities for purposes of exemption from state taxes is misplaced. It is true that Production Credit Associations do not enjoy all immunities of the United States, even though they are federal instrumentalities. However, implied immunity from state taxation for federal instrumentalities has been a settled niche in American jurisprudence since the early days of the Republic. Once it has been determined that the plaintiffs are federal instrumentalities, there arises an implied immunity from state and local taxation. *McCulloch v. Maryland*, 17 U.S. 316 (1819). *First Agriculture National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968).

The burden rests with the defendant to demonstrate that Congress has waived immunity from state taxation. Congress can waive tax immunity, but such waiver must be express:

> Congress must express a clear, express, and affirmative desire to waive the immunity from taxation enjoyed by a federal instrumentality.

Federal Reserve Bank of St. Louis v. Metrocentre Improvement District #1, 657 F.2d 183, 186 (8th Cir. 1981), aff'd 455 U.S. 995 (1982). Defendant has directed the Court to no express waiver from taxation, nor is the Court aware of any such express waiver. Thus, the defendant's only argument is that Congress has impliedly waived immunity from taxation for production credit associations. That is insufficient to sustain the burden.

Accordingly, the plaintiffs' Motion for Summary Judgment must be, and hereby is, granted. The defendant's Motion to Dismiss is denied. This case is dismissed.

DATED this 6th day of March, 1995.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF ARKANSAS WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

PLAINTIFFS

VS. NO. LR-C-94-394

STATE OF ARKANSAS

DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that State of Arkansas, defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order granting plaintiffs' Motion for Summary Judgment and denying defendant's Motion to Dismiss entered in this action on the sixth day of March, 1995.

Respectfully submitted,

MARTHA G. HUNT
Revenue Legal Counsel
Arkansas Supreme Court No. 87090
P. O. Box 1272, Room 209
Little Rock, AR 72203

COUNSEL FOR JOHN THEIS

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 95-1856

STATE OF ARKANSAS

VS.

APPELLANT

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICESOF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

APPELLEE

BRIEF FOR THE APPELLANT

BY: Martha G. Hunt
Revenue Legal Counsel
P. O. Box 1272, Room 209
Little Rock, Arkansas 72203
(501) 682-7030
Bar No. 87090

SUMMARY OF THE CASE AND WAIVER OF REQUEST FOR ORAL ARGUMENT

Appellees are four Production Credit Associations chartered by the Farm Credit Association who filed an action in the United States District Court for the Eastern District of Arkansas against Appellant State of Arkansas seeking a declaratory judgment that they are exempt from state and local taxes and an injunction against the imposition or assessment of such taxes by the State of Arkansas. Appellees moved for summary judgment on the basis that the applicable statutory provisions granted Production Credit Associations immunity from taxation as instrumentalities of the United States. Appellant's response to the motion denied that summary judgment was appropriate on the basis that statutory language conferring federal instrumentality status was not sufficient to confer immunity from state taxation; that immunity so conferred, if any, has been waived by Congress; and that summary judgment was not appropriate because of the existence of genuine issues of material fact which would be determinative on the issue of whether the function, control, ownership and operation of appellees allowed them to be considered "governmental" or private entities. The district court granted Appellees' Motion for Summary Judgment, from which this appeal is sought.

Appellant State of Arkansas waives oral argument. Adequate opportunity is afforded Appellant to present its case in the briefs.

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PRELIMINARY STATEMENT AND STATEMENT OF JURISDICTION

United States District Judge Henry Woods rendered the decision from which this appeal is sought in Case Number LR-C-94-394 in the United States District Court for the Eastern District of Arkansas.

Jurisdiction in the District Court of an action for declaratory judgment was proper pursuant to Article Six, Clause Two of the United States Constitution and 28 U.S.C. § 1331.

The Court of Appeals has jurisdiction of this appeal from the order of the District Court pursuant to 28 U.S.C. § 1291. The Order of the District Court granting summary judgement to Appellants was entered on March 6, 1995. The Notice of Appeal was timely filed in the District Court on April 3, 1995, within the thirty day requirement imposed pursuant to F.R.A.P. Rule 4, 28 U.S.C.A.

STATEMENT OF ISSUES

Whether statutory language granting federal instrumentality status to Production Credit Associations is sufficient to render them exempt from state tax.

United States v. New Mexico, 455 U.S. 720, 102S.Ct. 1373, 71 L.Ed. 2d 580 (1982)

Hanna v. Federal Land Bank Association of Southern Illinois, 903 F.2d 1159 (7th Cir. 1990)

National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. ___, 112 S.Ct. 1394, 118 L. Ed.2d 52, 66 (1992)

12 U.S.C. § 2077

Whether any immunity from state taxation conferred by statute to Production Credit Associations has been waived.

Farm Credit Act of 1933, Pub. L. No. 73-98, § 63, 48 Stat. 257, 267

Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678 (1985)

12 U.S.C. §§ 2023 and 2098

12 U.S.C. § 2214

Whether defendant presented a genuine issue of material fact regarding the waiver of immunity from taxation of Production Credit Associations sufficient to preclude the granting of a Motion for Summary Judgment that plaintiffs are tax exempt.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 265 (1986)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986)

Langley v. Allstate Insurance Co., 995 F.2d 841 (8th.Cir.1993)

Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992)

STATEMENT OF THE CASE

The District Court case was an action seeking a declaratory judgment that Appellees, four Production Credit Associations, are exempt from state and local taxes and an injunction against the imposition or assessment of such taxes by the State of Arkansas. Appellees moved for summary judgment on the basis that the plain language of the applicable statutory provisions granted immunity from taxation to Production Credit Associations as instrumentalities of the United States. Appellant responded that summary judgment was not appropriate on the basis that statutory language conferring federal instrumentality status was not sufficient to confer immunity from state taxation; that any immunity so conferred has been waived by Congress; and that genuine issues of material fact as to the functions, control and ownership of appellees was determinative of whether appellees functioned as "governmental" agencies. The district court granted Appellees' Motion for Summary Judgment, from which this appeal is sought.

STATEMENT OF FACTS

By letter dated May 5, 1994, Appellees requested an opinion of the Department of Finance and Administration of the State of Arkansas that Farm Credit Services of Central Arkansas, PCA, a production credit association, is exempt from state and local taxes due to its status as a federal instrumentality. By opinion letter dated May 26, 1995, Appellant refused to acknowledge that the PCA was exempt as a federal instrumentality. On June 17, 1994, Appellees, the PCA denied exempt status by Appellant and three other production credit associations, filed a Complaint for Declaratory Judgment seeking a declaratory judgment that Appellees are exempt from state and local taxes and an injunction against the imposition or assessment of such taxes by the State of Arkansas. Appendix P. 1.

Appellant filed a Motion to Dismiss Complaint and Brief in Support on July 6, 1994. Appendix P. 14. Appellees filed a Response to Defendant's Motion to Dismiss on July 15, 1994. Appendix P. 23. Appellees filed a Motion for Summary Judgment and Brief in Support on December 22, 1994. Appendix P. 31. Appellants requested an extension of time of ninety days in which to respond and were granted an extension to January 24, 1995 in which to respond. Appendix P. 65. Appellant filed a Response to Motion for Summary Judgment and Brief in Support on January 23, 1995. Appendix P. 66. Appellees filed a Reply to Defendant's Response on February 6, 1995. Appendix P. 78.

The District Court entered its Order granting Appellees Motion for Summary Judgment on March 6, 1995.

SUMMARY OF THE ARGUMENT

The fundamental question presented in this appeal is whether a production credit association, an entity created by the Farm Credit Act of 1933, is exempt from the imposition of state tax.

Appellees urge, and the district court agreed, that the "plain" language of the statute conferring instrumentality status on PCA's is sufficient to immunize them from the imposition of state tax. In 1982, the United States Supreme Court examined the precedents in the doctrine of federal immunity from state taxation and determined that immunity was proper only where the entity to be taxed was so closely related to the Government that it could be said to "stand in the shoes of the Government."

The statutory structure of the Farm Credit System encourages the participation of the borrowers, the farmers and ranchers who organize the association, own the stock, and elect the directors of the PCA, and demonstrates the separation between Farm Credit System institutions, particularly PCA's, and the federal government. The Farm Credit Administration acts as an "arm's length" regulator of the associations rather than a day-to-day supervisor. The statutory statement that a PCA is a Federal instrumentality does not, of itself, transform a PCA into a "government" entity, especially when the operation, ownership, and control of the PCA indicates that it is not governmental, but private. The plain language of 12 U.S.C. § 2077 is not sufficient to confer such immunity. Instead, the test of whether a PCA is an "instrumentality" for purposes of immunity from taxation is whether the activities of the PCA are "so closely connected to the Government that the two cannot realistically be viewed as separate entities."

Various statutory provisions of the present Farm Credit System legislation, as well as the legislative history of the acts creating and amending the Farm Credit System, provide a clear

indication that Congress intended to waive any exemption provided to production credit associations by virtue of their status as federal instrumentalities. The 1933 act creating production credit associations provided that the exemption from taxation for PCA's no longer applied after the PCA stock owned by the Government was retired. In 1985, this section was amended by striking the sentence providing the specific exemption and the waiver. Subsequent legislative history reveals that the intention of Congress in striking these sentences was to remove the reference to the Governor, a position which the amendment abolished, rather than to provide a specific exemption from taxation for PCA's. The statutory language in the sections addressing the taxation of banking institutions of the Farm Credit System provides a more specific exemption from tax for those institutions than does the statutory language addressing taxation of PCA's. This, as well as other statutory language, reflect Congressional intent that PCA's not be afforded total immunity from taxation.

The district court erred by granting the appellees' motion for summary judgment based upon its acceptance of the interpretation of the statute urged by the appellees, without affording appellant an opportunity to present evidence as to the genuine issues of material fact raised by appellant, including a factual finding as to the functions performed by the appellees, and whether those functions are governmental; the control exercised over appellees by the Farm Credit Administration; whether the stock of appellees is owned by the government or by individual investors; and whether appellees' employees are treated as federal employees, all of which factual issues are determinative of appellees' status as private or governmental entities, capable of "standing in the shoes of the Government.

ARGUMENT
I.

THE "PLAIN LANGUAGE" OF 12 U.S.C.A.§ 2077 DOES NOT PROVIDE TOTAL IMMUNITY FROM STATE TAXATION TO A PRODUCTION CREDIT ASSOCIATION

Appellees assert, and the district court agreed, that Production Credit Associations (hereinafter referred to as "PCA's") have been granted immunity from the imposition of state tax by 12 U.S.C. § 2077 which provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

In order to accept the position urged by appellees, it is necessary to concede that the "plain language" of the statute states, without ambiguity, that a production credit association is immune from any tax which the State of Arkansas might attempt to impose. Appellant does not dispute that in statutory construction, the "starting point is the language of the statute." *Dole v. United Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929, 934, 108 L.Ed.2d 23 (1990) (quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985). However, statutory language is frequently capable of more than one interpretation. As expressed by the Supreme Court in *National R.R. Passenger Corp. v. Boston & Maine*

Corp., 503 U.S. ___, 112 S.Ct. 1394, 118 L. Ed.2d 52, 66 (1992), "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."Appellees contend that the language in 12 U.S.C.A. § 2077 confers federal instrumentality status on production credit associations, and as such they are entitled to immunity from state taxation. In prior decisions, the United States Supreme Court has held that federal instrumentalities, and in particular federal land banks, which like production credit associations are a part of the Farm Credit System, are immune from taxation by virtue of their performance of governmental functions. *See, e.g., Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961); *Federal Land Bank of Saint Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941). However, in its 1982 decision in *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), the Supreme Court clarified the doctrine of federal immunity from state taxation:

> With the famous declaration that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 4 Wheat 316, 431, 4 L.Ed. 579 (1819), Chief Justice Marshall announced for the Court the doctrine of federal immunity from state taxation. In so doing he introduced the Court to what has become a "much litigated and often confused field," *United States v. City of Detroit*, 355 U.S. 466, 473, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958), one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.
>
> ...
>
> We have concluded that the confusing nature of our precedents counsels a return to the underlying constitutional principle. The one constant here, of course, is simple enough to express: a State may not, consistent with the Supremacy Clause, U.S.

> Const, Art VI, cl 2, lay a tax "directly upon the United States." *Mayo v. United States*, 319 U.S. 441, 447, 87 L.Ed. 1504, 63 S.Ct. 1137, 147 ALR 761 (1943). While "[o]ne could, and perhaps should, read M'Culloch . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality," *First Agricultural Bank v. State Tax Comm'n*, 392 U.S. 339, 350, 20 L.Ed.2d 1138, 88 S.Ct. 2173 (1968) (dissenting opinion), the Court has never questioned the propriety of absolute federal immunity from state taxation.
>
> ...
>
> But the limits on the immunity doctrine are, for present purposes, as significant as the rule itself. Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.
>
> ...
>
> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on any agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine , that of forestalling "clashing sovereignty," *McCulloch v. Maryland*, 4 Wheat, at 430, 4 L.Ed. 579, by preventing the States from laying demands directly on the Federal Government. See *City of Detroit v. Murray Corp.*, 355 U.S. at 504-505, 2 L.Ed 441, 78 S.Ct. 458 (opinion of Frankfurter, J.). As the federal structure-along with the workings of the tax

immunity doctrine-has evolved, this command has taken on essentially symbolic importance, as the visible "consequence of that [federal] supremacy which the constitution has declared." *McCulloch v. Maryland,* 4 Wheat, at 436, 4 L.Ed 579. At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority. See *Graves v. New York ex rel. O'Keefe*, 306 U.S. at 483, 83 L.Ed. 927, 59 S.Ct. 595, 120 ALR 1466.

Thus a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." *City of Detroit v. Murray Corp.*, 355 U.S. at 503, 2 L.Ed. 2d 441, 78 S.Ct. 458 (opinion of Frankfurter, J.).

71 L.Ed.2d at 589, 591, 592, 593.

Following the opinion in *United States v. New Mexico*, the test is whether a production credit association is an "instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." The *Bismarck* Court, supra, indicated that Congress had authority to immunize from taxation all activities "connected with, or in furtherance of, the lending functions of federal credit agencies." 314 U.S. at 103. Subsequent to the Court's holding in *Bismarck*, various jurisdictions have concluded that federal land banks and production credit associations are more like private corporations than federal agencies for various purposes. *See e.g., Hanna v. Federal Land Bank Association of Southern Illinois*, 903 F.2d 1159 (7th Cir. 1990) (federal land bank and production credit associations held private employer without

sufficient governmental involvement to constitute federal agencies exempt from jury trial in action by form employee); *Birbeck v. Southern New England Production Credit Association*, 606 F.Supp. 1030 (D.Conn. 1985) (production credit association considered private entity rather than governmental agency for purposes of invoking federal due process clause); *DeLaigle v. Federal Land Bank of Columbia*, 568 F.Supp. 1432 (S.D.Ga.1983) (federal land bank held private corporation without sufficient governmental involvement to support cause of action under federal due process clause); *Federal Land Bank of Columbia v. Cotton*, 410 F. Supp. 169 (N.D.Ga. 1975) (federally chartered corporation is not an "agency" unless the government has a substantial proprietary interest in it, or at least exercises considerable control over operation and policy of the corporation; held federal land bank was meant to be private, rather than governmental, corporation for purposes of federal district court jurisdiction).

Although the above cited cases address federal instrumentality status of production credit associations and other Farm Credit System institutions for purposes other than taxation, they support the proposition that these Farm Credit System institutions are entities separate and distinct from the federal government in many respects, and that heavy federal regulation alone is not sufficient to transform a private entity into an entity which "stands in the Government's shoes." Although the Farm Credit Administration regulates the System, the stated objective of the Farm Credit Act is to encourage the participation of farmer- and rancher borrowers in the management, control, and ownership of a farm credit system, rather than supervising day to day System management. 12 U.S.C.A. §§ 2001, 2002 (West 1989). The Farm Credit Act and amendments demonstrate the separation between Farm Credit System institutions, particularly PCA's, and the federal government. Each PCA is organized and owned by the farmers and ranchers who are the borrowers, not the government, and is controlled

by an independent board of directors elected by the members. 12 U.S.C.A. §§ 2071, 2072, 2073 (West 1989).

Based on the structure and stated objectives of the Farm Credit System and the foregoing cases, production credit associations are not so closely connected to the federal government as to confer upon them immunity from state taxation. The holdings of the Eighth Circuit in *Rohweder v. Aberdeen Production Credit Association*, 765 F.2d 109 (8th Cir. 1985) and *Schlake v. Beatrice Production Credit Association*, 596 F.2d 278 (8th Cir. 1979) are distinguishable from the case herein. In *Rohweder*, the issue is whether the "sue and be sued" clause in the enabling legislation for production credit associations constitute statutory authorization of punitive damage awards against a production credit association as a federal instrumentality. In *Schlake* the issue is whether the federal instrumentality status of production credit associations vest subject matter jurisdiction in the federal courts under the due process clause. The Court recognizes that production credit associations are federal instrumentalities in each of these cases. However, in neither opinion does the Court acknowledge that based solely upon this statutory status a production credit association "stands in the shoes of the Government."

The statutory statement that a PCA is a Federal instrumentality does not, of itself, transform a PCA into a "government" entity, especially when the operation, ownership, and control of the PCA indicates that it is not governmental, but private. The plain language of 12 U.S.C. § 2077 is not sufficient to confer such immunity. Instead, the test of whether a PCA is an "instrumentality" for purposes of immunity from taxation is whether the activities of the PCA are "so closely connected to the Government that the two cannot realistically be viewed as separate entities. *United States v New Mexico*, supra.

II.
CONGRESS DID NOT INTEND TO GRANT ABSOLUTE IMMUNITY FROM THE IMPOSITION OF STATE TAXATION TO PRODUCTION CREDIT ASSOCIATIONS

An examination of the history of the Farm Credit System is helpful to an analysis of whether an exemption from taxation has been afforded PCA's, and, if so, whether it has been waived.

The Farm Credit System was created in 1916 to provide agricultural credit to American farmers. The Federal Farm Loan Act, Pub. L. No. 64-158; 39 Stat. 360 (1916) provided for the establishment of twelve district Federal land banks whose purpose was to make long-term loans through Federal land bank associations to farmers. The twelve district Federal intermediate credit banks were created by the Agricultural Credits Act of 1923 to fund short and intermediate term loans.

The Farm Credit Act of 1933, Pub. L. No. 73-98; 48 Stat. 257 (1933) established the Farm Credit Administration, an independent federal agency comprised of the thirteen member Federal Farm Credit Board who hired a full time Governor and other officers and employees, with responsibility to oversee the banks and associations comprising the system. This legislation incorporated the provisions regarding the associations created in 1916 and 1923 and created Production Credit Associations and Banks for Cooperatives. The PCA's purpose was to obtain short and intermediate-term loans from Federal intermediate credit banks in order to facilitate the delivery of credit services to farmers and ranchers. The Banks for Cooperatives were to make loans and provide credit services to agricultural, aquatic, and rural utility cooperatives. At their inception, the stock in PCAs was owned by both the government and by farmers and ranchers.

The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), the purpose of which, according to the legislative history, was to rewrite, modernize, and streamline the statutory authority of the Farm Credit System, repealed most of the existing statutory authority for the Farm Credit System in the rewriting process. The resulting Farm Credit System consisted of twelve Farm Credit Districts, in each of which was located three System banks: a Federal land bank, a Federal intermediate credit bank, and a bank for cooperatives. *See generally*, H. R. Rep. No. 593, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2091.In the early 1980's the depressed agricultural economy resulted in financial stress on the Farm Credit System. The Committee on Agriculture began consideration of amendments to the Farm Credit System legislation to address these problems. The purposes of the amendments were to reorganize and strengthen the Farm Credit Administration, the federal agency which supervises Farm Credit System activities. This would be done by removing the day-to-day participation and make the agency an "arm's-length" regulator. The existing thirteen member part-time Board would be replaced by a full-time three member Board and the position of Governor abolished. *See generally*, H. R. Rep. No. 425, 99th Cong., 1st Sess., reprinted in 1985 U.S. Code Cong. & Admin. News 2587.

In 1933, the statute which addressed the taxation of PCA's at their creation, as well as that of the Central Bank for Cooperatives, the Production Credit Corporations, and Bank for Cooperatives, read as follows:

> The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other

> such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.* (emphasis added)

Farm Credit Act of 1933, Pub. L. No. 73-98, § 63, 48 Stat. 257, 267.

The Farm Credit Act of 1971 repealed the existing farm credit legislation and rewrote the Farm Credit Act. The existing tax status of PCA's was reenacted under the PCA section of the bill (Sec. 2.17), with little change in the language of the statute other than the removal of the reference to the associations other than PCA's. *See*, H. R. Rep. No. 593, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2091, 2111.

The language of the waiver of exemption from taxation, following the 1971 amendment read, "The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration." Farm Credit Act of 1971, Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971).

Decisions that occurred during the period following the retirement of all PCA stock held by the Government, while not decided under current law, are indicative of the clear statutory waiver of the exemption. *See e.g., Woodland Production Credit Association v. Franchise Tax Board*, 37 Cal. Rptr. 231 (1964) (statutory waiver of exemption from taxation of PCA's permits taxation of the corporation itself; thus PCA not exempt from California franchise tax which is a tax on the income of the corporation); *Columbus Production Credit Association v. Bowers*, 173 Ohio St. 97, 180 N.E.2d 1 (1962), cert. den. 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (production credit association held not exempt from Ohio franchise tax; exemption from state taxation waived by Congress in provision that exemption will not apply after the stock in the PCA held by the governor has been retired).

The Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678, 1705 (1985) amended the section relating to the taxation of PCA's by "striking out the last two sentences of section 2.17." This amendment was included in Section 205 which "contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration." H.R. Rep. No. 425, 99th Cong., 1st Sess. reprinted in 1985 U.S. Code Cong. & Admin. News 2587, 2615. The intent, as reflected in legislative history, was to remove references to the Governor of the Farm Credit Administration , "since such office . . . will no longer exist . . ."

Id. at 2615. The last two sentences so stricken read:

> Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the united States or by any State, Territorial, or local taxing authority, except that interest on the obligations of such association shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

The February 23, 1988 daily edition of the Congressional Record, contains a discussion in the House of Representatives between Mr. De La Garza, Chairman of the Committee on Agriculture at the time of the 1985 amendments to the Farm Credit Act, and Mrs. Smith of Nebraska, which directly addresses the deletion of the two sentences in the section addressing taxation of PCA's. The relevant portions of that discourse include the following:

> Mrs. SMITH of Nebraska. Mr. Speaker, I have been alerted by the Nebraska Department of Revenue of an oversight in the 1985 farm credit amendments (Public Law 99-205) that has technically exempted Production Credit Associations and Banks for Cooperatives from property taxation. Section 205, under the heading technical and conforming amend-

ments, amends section 2.17 and 3.13 of the Farm Credit Act (12 U.S.C. 2098 and 12 U.S.C. 2134) by striking out the last two sentences in both sections. Is this the gentleman's understanding?

(NOTE: At that time, Section 2.17 was codified as 12 U.S.C. §2098, presently § 2077.) (explanation added)

Mr. De La GARZA. The gentlewoman is correct.

Mrs. SMITH of Nebraska. It is my understanding that these changes were made to delete references to the Governor of the Farm Credit Administration to conform to changes made elsewhere in the 1985 Farm Credit Amendments Act. Is that the gentleman's understanding?

Mr. De La GARZA. That is my understanding as well.

Mrs. SMITH of Nebraska. The sentences that were deleted pertained to the taxation of real and tangible personal property held by Banks for Cooperatives and Production Credit Associations. The amended sections I have referenced stated that property, income, capital, and reserves of such associations are exempt from all taxation except that any real and tangible personal property would be subject to Federal, State, territorial, and local taxation to the same extent as similar property.

Mr. De La GARZA. That is the way those sections read before the technical corrections were made in 1985.

Mrs. SMITH of Nebraska. Were these changes made

with the intent to exempt real and tangible personal property held by such associations from property taxation.

Mr. De La GARZA. To my understanding, that was not the intent of my committee, nor of the committee of conference on the 1985 farm credit amendments.

Mrs. SMITH of Nebraska. Is it your understanding that although local governments are not given specific authority to levy property taxes on property owned by such associations, they are not prevented from doing so?

Mr. De La GARZA. Mr. Speaker, I would inform the gentlewoman from Nebraska [Mrs. Smith] that that is the advice of our legal counsel and certainly consistent with my understanding of the conference.

134 Cong. Rec. H 462 (daily ed. February 23, 1988) (discussion between Reps. De La Garza and Smith)

A comparison of the statutory language addressing the taxation of the Farm Credit banking associations to that of PCA's is also helpful. 12 U.S.C. § 2023 provides:

> The Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent according to its value, as other similar property held by other persons is taxes. The mortgages held by the Farm Credit Banks and the notes, bonds, debentures, and other obligations issued by the banks

> shall be considered and held to be instrumentalities of the United States, and, as such, they and the income therefrom shall be exempt from all Federal, State, municipal, and local taxation, other than Federal income tax liability of the holder thereof under the Public Debt Act of 1941 (31 U.S.C. 3124).

The language in Section 2098 of Title 12, the section on taxation of Federal land bank associations, is identical to the language of Section 2023 with the words "Federal land bank associations" replacing the words "Farm Credit Banks" each time they appear in the section.

A statutory provision in the Farm Credit Act which reflects that Congress did not intend the tax exemption for PCAs to be absolute is the language of 12 U.S.C. § 2214 which provides:

> State and other laws shall apply to corporations organized pursuant to this part to the same extent such laws would apply to the organizing banks engaged in the same activity in the same jurisdiction: Provided, however, That to the extent that sections 2023, 2098, and 2134 of this title may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect to franchise taxes, shall not extend to corporations organized pursuant to this part.

First, Congress provided a more specific exclusion from taxation for Farm Credit Banks and Federal land bank associations in the language of the statute addressing taxation by providing in Sections 2023 and 2098 that "the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt" while the PCA statute (Section 2077) provides that the "notes, debentures, and other obligations issued by such associations shall be exempt." This difference in language is clearly indicative of Congress' intent that PCA's not have the same tax exemption as Farm Credit banking institutions. Second, the

language in Section 2214 is another clear indication of Congressional intent that the more specific tax exemption provided for Farm Credit banking institutions in Sections 2023, 2098, and 2134 was not intended to be provided for PCA's in Section 2077.

The legislative history of various provisions of the Farm Credit Act, as well as actual statutory language, indicate that Congress intended to waive any immunity from taxation which may be imputed to production credit associations by virtue of their status as federal instrumentalities. The legislative history of the changes in the statue reflect Congressional intent to waive total immunity from taxation for PCAs. The interpretation of the statute urged by appellees and accepted by the district court provides an interpretation of Section 2077 that is at odds with other provisions of the Farm Credit Act.

III.
SUMMARY JUDGMENT WAS NOT APPROPRIATE WHERE THE ISSUE, DOES A PRODUCTION CREDIT ASSOCIATION "STAND IN THE GOVERNMENT'S SHOES," REQUIRED A FINDING OF FACT.

The Court of Appeals review a grant or denial of summary judgment *de novo*. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see, e.g.*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Langley v. Allstate Insurance Co.*, 995 F.2d 841 (8th.Cir.1993); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir.

1992).

In the Response to Motion for Summary Judgment and Brief in Support, appellant specifically enumerated the genuine issues of material fact remaining that relate to whether appellees should be considered federal instrumentalities for purpose of exemption from state tax. Those issues included a factual finding as to the functions performed by the appellees, and whether those functions are governmental; the control exercised over appellees by the Farm Credit Administration; whether the stock of appellees is owned by the government or by individual investors; and whether appellees' employees are treated as federal employees. The District Court erred in granting summary judgment for the appellees based on statutory language without affording appellant an opportunity to adduce and present evidence that the function, control, ownership, and operation of production credit associations more closely resemble those of a private corporation than an entity which "stands in the Government's shoes" as required following the opinion in *United States v. New Mexico.*

CONCLUSION

The District Court erred in granting summary judgment for appellees. On appeal the Court should find that, based upon the existing statutory language and legislative history Congress intended to waive any immunity provided to production credit associations by virtue of their status as federal instrumentalities, or in the alternative, should afford appellant an opportunity to present evidence that, in their structure and function, production credit associations are more like private than governmental corporations and are thus not immune from taxation as federal instrumentalities.

Respectfully submitted,
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By:_____

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(Certificate of Service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF ARKANSAS APPELLANT

VS . NO. 95-1856

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

APPELLEES

APPEAL FROM
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BRIEF OF APPELLEES,

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION and DELTA PRODUCTION CREDIT ASSOCIATION

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REQUEST FOR ORAL ARGUMENT

The State of Arkansas, in its Appellant Brief, waived request for oral argument. However, oral argument is necessary due to the constitutional nature of this case and the importance of the issues involved, as such, written briefs do not afford Appellees sufficient opportunity to present their argument. Therefore, Appellees, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Association, and Delta Production Credit Association, hereby request a twenty minute oral argument.

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STATEMENT OF THE CASE

Appellees, four Production Credit Associations, brought suit in the United States District Court for the Eastern District of Arkansas, against the State of Arkansas seeking a declaratory judgment that Production Credit Associations are exempt from state sales and income taxation and for an injunction against the State of Arkansas for the imposition of such taxes. Appellees moved for summary judgment on the ground that there was no genuine issue of material fact relevant to the issue of whether Production Credit Associations were immune from state sales and income taxation because Production Credit Associations are statutorily declared instrumentalities of the United States, and absent express Congressional waiver, are entitled to immunity from state income and sales taxation.

The State of Arkansas responded that Congressional declaration of Production Credit Associations as federal instrumentalities was insufficient to confer tax immunity; that waiver of immunity should be implied; and that it was necessary to make a factual inquiry into the governmental nature of Production Credit Associations in order to determine whether they were Federal instrumentalities immune from state taxation. The District Court agreed with Appellees and accordingly granted their motion for summary judgment.

STATEMENT OF FACTS

On May 5, 1994, Appellees requested the Arkansas Department of Finance and Administration to refund all taxes paid on the basis that Production Credit Associations are federal instrumentalities immune from income and sales tax imposed by the State of Arkansas. Appendix at 6. On May 26, 1994, the State denied the request for refund and refused to recognize that Production Credit Associations are federal instrumentalities. Appendix at 11. On June 17, 1994, Appellees filed suit for a declaratory judgment that Production Credit Associations were

federal instrumentalities immune from state sales and income taxation and for an injunction against the State of Arkansas for imposition of such taxes. Appendix at 1. On December 22, 1994, Appellees filed Motion for Summary Judgment and Brief in Support. Appendix at 31. On January 23, 1995, the State filed a Response to Motion for Summary Judgment and Brief in support. Appendix at 66. On February 6, 1995, Appellees filed a Reply to Defendant's Response. Appendix at 78.

The District Court granted Appellees' Motion for Summary Judgment by its Order of March 6, 1995. Appendix at 87.

SUMMARY OF THE ARGUMENT

Production Credit Associations are expressly declared by statute to be "instrumentalities of the United States." 12 U.S.C.S. §§ 2071, 2077. As Federal instrumentalities, they are immune from state taxation unless Congress has waived that immunity. The statutory provision for taxation of Production Credit Associations, Section 2077, does not contain such a waiver. The analysis should end there, and accordingly, Production Credit Associations should be held exempt from state sales and income taxation.

The State of Arkansas argues (1) that the Congressional declaration that Production Credit Associations are federal instrumentalities is insufficient to confer immunity, and (2) that even though the statute does not expressly provide waiver, Congress nevertheless intended it. For the reasons -- discussed below, both arguments lack merit.

The State urges that the factual analysis set forth in United States v. New Mexico, 455 U.S. 720 (1982), controls this case. The issue in that case was the tax immunity available to private contractors doing business with the federal government. The Supreme Court engaged in a factual inquiry into the nature of the contractors to determine if they "stood in the Government's shoes." Id. at 736. Such an inquiry is neither necessary nor appropriate in this case because Congress has spoken on the issue

by expressly declaring that Production Credit Associations are Federal instrumentalities. Federal instrumentalities governmental and inherently stand in the shoes of the government.

The State also urges this Court to find implied waiver of immunity through the sparse legislative history of the statute. At the' district court level, and in its Appellant brief, the State has not shown that the statute at *issue is* ambiguous or contains any language which could be construed" as a waiver of immunity. Rather, it delves into prior acts and legislative materials in an effort to make the statute ambiguous. Even though the State's arguments are without merit and speculative at best, the State should not be allowed to make unclear a statute that clearly provides no waiver of immunity from the taxation that the State seeks to impose.

The sole issue involved in this case is a legal one: whether Production Credit Associations as Federal instrumentalities are exempt from the challenged state taxation. The State in its attempt motion for summary judgment attempted into a factual one by arguing for an Credit Associations'closeness to defeat Appellees' to change this inquiry analysis of Production the government. Because this argument was misplaced, the State did not offer any facts relevant to the legal issue, and thus, summary judgment was appropriate. Therefore, the District Court properly granted Appellees' motion for summary judgment because the State could not show the existence of any genuine issue of material fact relevant to the determination that Production Credit Associations are Federal instrumentalities exempt from state sales and income taxation.

ARGUMENT

INTRODUCTION

Appellees are Production Credit Associations and member institutions of the Farm Credit System, organized and chartered by Congress. The institutions of the Farm Credit System enjoy a unique status. They are the only governmentally chartered corporations which are denominated "federally chartered instrumentalities of the United States." Production Credit Associations are identified as Federal-~ instrumentalities in the following three sections of the Farm Credit Act of 1971 (Pub. L. 100-233, 101 Stat. 1568, 100th Cong., H.R. 3030 (Jan. 6, 1988)):

> 12 U.S.C.S. § 2071(a): "Each production credit association shall continue as a Federally chartered instrumentality of the United States."
>
> 12 U.S.C.S. § 2071(b)(7): "On approval of the proposed articles . . . the [production credit] association shall become as of such date a federally chartered body corporate and an instrumentality of the United States."
>
> 12 U.S.C.S. § 2077: "Each production credit association and its obligations are instrumentalities of the United States . . .."

Similar designations have been given to the other Farm Credit System institutions including the Farm Credit Banks, the Federal Land Banks, the Federal Land Bank Associations, Banks for Cooperatives, and the National Bank for Cooperatives. See 12 U.S.C.S. §§ 2011, 2091, 2121 (Supp. 1994); 12 U.S.C. § 2011 (1982).

Congress has specifically identified the Farm Credit System institutions as Federal instrumentalities because of the impor-

tant governmental purpose which they serve. 12 U.S.C.S. § 2001(a) (1984) states:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

The United States Supreme Court has repeatedly acknowledged the important governmental purpose served by the institutions of the Farm Credit System. In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the Court discussed the function of the Federal Land Banks and the Farm Loan Associations. The Court stated:

> The Federal land banks are constitutionally created, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions, the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank v. Priddy*, 295 U.S. 229, 231; *Federal Land Bank v. Gaines*, 290 247, 254. The national farm loan associations, the local cooperative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Knox National Farm Loan Assn. v. Phillips*, 300 U.S. 194, 202; *Federal Land Bank v. Gaines*, supra, 254.

314 U.S. at 102. The status of the Farm Credit System institutions as Federal instrumentalities was reconfirmed in Federal Land Bank of Wichita v. Board of County Comm'rs, 368 U.S. 146 (1961). In response to the State's argument that the Federal Land Banks were engaged in commercial or proprietary activity, the Court stated:

> Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; however, our decisions have made it clear that the Federal Government performs no "proprietary" functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed;

368 U.S. at 150-51.

In sum, the Production Credit Associations are specifically recognized by Congress as "Federal instrumentalities" performing an important governmental function. The status of the institutions of the Farm Credit System as Federal instrumentalities engaged in the performance of an important governmental function has repeatedly been recognized by the United States Supreme Court. The District Court correctly concluded that Production Credit Associations are Federal instrumentalities exempt from Arkansas taxation.

I. GRANTING PLAINITFFS' MOTION FOR SUM MARY JUDGMENT WAS PROPER WHERE THE APPELLANT FAILED TO SHOW THE EXISTENCE OF ANY MATERIAL FACT RELEVANT TO THE ISSUE OF PRODUCTION CREDIT ASSOCIATIONS' STATUS AS TAX EXEMPT FEDERAL INSTRUMENTALITIES.

The Court of Appeals reviews a grant or denial of summary judgment *de novo. Moore v. Webster,* 932 F.2d 1229 (8th Cir. 1991). The question before this Court, whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is thus entitled to summary judgment as a matter of law, (Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)), must be answered in the affirmative.

There are no genuine issues of material fact at issue in this case. It is undisputed that Appellees are Production Credit Associations chartered and organized under the Farm Credit Act of 1971. They are Federal instrumentalities pursuant to the plain language of Sections 2071 and 2077 of Title 12 of the United States Code. The issue involved in this case, whether Production Credit Associations as Federal instrumentalities are immune from state sales and income taxation, is not determined by any factual inquiry, rather, it is a legal question, and the factors that the State urged the District Court to consider were not relevant to this issue. As such, Appellees' motion for Summary Judgment was properly granted.

II. PRODUCTION CREDIT ASSOCIATIONS ARE FEDERAL INSTRUMENTALITIES EXEMPT FROM STATE TAXATION.

Appellees' position is clear. First, Congress expressly declared Production Credit Associations to be Federal instrumentalities. Second, Federal instrumentalities are accorded immu-

nity from state taxation under the long-standing doctrine of constitutional immunity from state taxation, as first announced in *McCulloch v. Maryland,* 17 U.S. 316 (1819). "[A] federal instrumentality is not subject to the plenary power of the States to tax..." *Federal Land Bank of Wichita v. Board of County Comm'rs.*, 368 U.S. 146 (1961). "It is a well-established doctrine that federal agencies or instrumentalities are immune from special assessments by state and local governments." *Federal Reserve Bank of St.* Louis v. Metrocentre Improvement Dist. #1 657 F.2d 183, 185 (8th Cir. 1981), *aff'd sub nom*, 455 U.S. 995 (1982). "It is familiar law that a State has no power to tax the property of the United States or any of its instrumentalities within its limits without the consent of Congress ..." *Board of Directors of Red River Levee Dist. No. 1 v. Reconstruction Finance Corp.*, 170 F.2d 430, 431 (8th Cir. 1948).

Finally, it instrumentality is well established law that a Federal immune from state taxation unless Congress expressly, clearly, and affirmatively consents to its taxation. *See Department of Employment v. U.S.*, 385 U.S. 355 (1966); *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1, supra; United States v. City of Adair*, 39 F.2d 1185 (8th Cir. 1976), *cert. denied*, 429 U.S. 121 (1977).

These three propositions form the bases of the District Court's decision and are beyond dispute.

As its basis for reversal, the State contends that Congress' declaration that a Production Credit Association is a Federal instrumentality is not sufficient to establish that it is a "government" entity. (Appellant's Brief at 14). The State urges that United States v. New Mexico, 455 U.S. 72P (1982), controls this case and requires a factual inquiry to determine if a Production Credit Association is "so closely connected to the Government that the two cannot realistically be viewed as separate

entities." (Appellant's Brief at 15).[1]

The State's reliance on *New Mexico* is clearly misplaced. In *New Mexico*, the Supreme Court addressed the issue of whether a tax imposed on the receipts of a government contractor was an unconstitutional levy on the Federal government itself; instrumentality status was not claimed, nor was it at issue. When the Federal government or an instrumentality thereof is not the taxpayer, the Court held that state tax immunity is confined to private taxpayers who actually "stand in the Government's shoes." *United States v. New Mexico*, 455 U.S., at 736 (quoting *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503 (1958)).

On the issue of immunity from state taxation, the Supreme Court has specifically recognized the difference between private contractors and Federal instrumentalities. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (state tax on gross receipts of private contractor providing services to Federal government was upheld). "Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor

[1] It is important to note that the Appellant failed to inform the Court that at issue in *New Mexico* was "a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?" *New Mexico*, 455 U.S. at 722. In addition, the government did not claim that the contractors were Federal instrumentalities. Id. at 725. Thus, in New Mexico, the Court did not have before it the issue of the tax immunity of a statutorily-declared Federal instrumentality, and the Court's decision must be read in light of this fact. It is significant to point out that since *New Mexico* was handed down, no court has applied its analysis to determine the tax status of an entity that Congress declared to be a Federal instrumentality by statute.

in performing services for the United States." Id. at 153.[2]

The State's error is further explained in *United States v. City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990), which held the *New Mexico* analysis unnecessary with respect to the state tax immunity of a Federal instrumentality. In *City of Spokane*, at issue was the attempted taxation of lawfully conducted gambling activities of a local unit of the American National Red Cross. The Red Cross was federally chartered in 1905 and declared to be an instrumentality of the United States in *Department of Employment v. U.S.*, 385 U.S. 355 (1966) .

The City relied upon *New Mexico* to argue that the Red Cross was not exempt from the Spokane gambling tax. The Ninth Circuit distinguished *New Mexico* and found the analysis of that case unnecessary.

> But the City claims that there is still another string to its bow, for some activities of agencies of the United States can be taxed. Here again, when gazing upon the authorities cited one must be purblind if one is to overlook the distinctions between those authorities and this case.
>
> Thus, in *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), a private independent corporation that had contracts with the United States complained about the taxation of its gross receipts. The Court declined to find that a tax on the private entity was a tax upon the government or its instrumentalities, even though the effect of the tax could, in theory, be felt by the government. *James*, 302 U.S. at 161, 58 S.Ct. at 221.

[2] It Should be noted that *Dravo* was cited with approval by the Supreme Court in *New Mexico* as the case which "set the doctrine [of constitutional immunity] on its modern course [differentiating between private taxpayers and governmental instrumentalities]." *Dravo*, 455 U.S. at 736.

That is not this case; the Red Cross is no mere private contractor, it is a United States instrumentality. The same analysis applies to *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L. Ed.2d 580 (1982). There, too, a tax on the receipts of private contractors was attacked; there, too, the tax was sustained. The Court indicated that the mere fact that a contractor acts as an agent of the government does not mean that it is an agency or instrumentality of the government. It does not mean that the contractor stands in the government's shoes. 455 U.S. at 735-36, 102 S.Ct. at 1383. The entities in question were not so integrated into the structure of the government that its tax immunity devolved upon them. Rather, it was realistic to view them as the private entities they were -entities "independent of the United States." 455 U.S. at 738, 102 S.Ct. at 1385. When dealing with entities of that stripe, it is necessary to be extremely careful about parsing their various activities when they claim that a tax falls directly on the United States. The same does not apply when one is dealing with an acknowledged government instrumentality such as the Red Cross. To do so in that instance would engage the courts in the unfit inquiry that *M'Culloch* warned against. 17 U.S. (4 Wheat.) at 430. Private independent contractors may be agencies because they act as agents. They are not to be confused with instrumentalities like the Red Cross which are agencies because they were created to carry out functions of the government itself and are, therefore, imbedded in the structure of the government to that extent.

City of Sookane, 918 F.2d at 87-88.

Congress expressly declared that Production Credit Associations are governmental entities. 12 U.S.C.S §§ 2071, 2077.- By that designation, they stand in the shoes of the government. "The federal government is one of delegated powers, and from

that it necessarily follows that any constitutional exercise of its delegated powers is governmental. When Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941) (refusing to impose tax on Federal Land Bank and rejecting argument that Federal Land Banks are proprietary rather than governmental).

> Legitimate activities of governments are sometimes classified as 'governmental' or 'proprietary'; however, our decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a government function is being performed.

Federal Land Bank of Wichita v. Board of County Comm'rs., 368

U.S. 146, 150-51 (1961).

These cases show that the court's proper inquiry is not whether the activities of a Federal instrumentality are governmental or private in nature, but rather whether the entity was constitutionally created and whether its activities are within the scope of the authority granted to it by Congress. The State does not challenge the constitutionality of Production Credit Associations or assert that these Production Credit Associations exceeded the scope of their Congressional charter.

Even if the court engages in a review of the activities of Production Credit Associations, it should still uphold the District Court's decision. Appellees perform governmental functions, and this Court has so held: "Farm Credit entities are instrumentalities of the federal government, engaged in the per-

formance of an important governmental function." *Slotten v. Hoffman*, 999 F.2d 333, 335 (8th Cir. 1993) (citing *Federal Land Bank v. Priddy*, 295 U.S. 229 (1934)).[3]

The State has cited various cases from other circuits and state courts which analyze the status of entities of the Farm Credit System for purposes other than taxation. (Appellant's Brief at 12-13). This court has clearly held that because of policy considerations, the test of whether an entity is an instrumentality for purposes of taxation differs from those tests or analyses applied for other purposes. *Federal Reserve Bank of St. Louis v. Metrocentre Improvement* Dist. #1, 657 F.2d 183, 185 Fn.2 (8th Cir. 1981), aff'd sub *nom*, 455 U.S. 995 (1982). *See also, City of Spokane*, 918 F.2d at 88 (distinguishing holding for purposes of Freedom of Information Act from determination for tax purposes). Accordingly, this Court should disregard any inference that the State suggests can be drawn from such cases outside the area of taxation.

In sum, Production Credit Associations, by virtue of their instrumentality status, "stand in the shoes of the Government" and perform governmental functions. The State overlooks this in relying on the government contractor analysis of *New Mexico*. After acknowledging that Production Credit Associations are Federal instrumentalities, as expressly declared by Congress, the inquiry then turns to the second part of the immunity analysis, whether Congress has waived their immunity from state and local taxation.

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[3] The Sixth Circuit recently upheld the instrumentality status of Federal Credit Unions and, in so doing, analogized their important governmental function to that of Farm Credit institutions. See *United States v. Michigan*, 851 F.2d 803, 806 (6th Cir. 1988) (holding Federal Credit Unions exempt from Michigan sales tax).

III. CONGRESS HAS NOT WAIVED THE TAX IMMUNITY OF PRODUCTION CREDIT ASSOCIATIONS.

The only statute addressing taxation of Production Credit Associations, 12 U.S.C.S. § 2077 (Supp. 1994), states as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

An-instrumentality of the United States is not subject to state taxation unless Congress expressly, clearly, and affirmatively consents to such taxation. *Department of Employment v. U.S.*, 385 U.S. 355 (1966); *Federal Reserve Bank* of St. Louis v. Metrocentre Improvement Dist. #1 657 F.2d183 (8th Cir. 1981), *aff'd sub nom*, 455 U.S. 995 (1982); *United States v. City of Adair*, 539 F.2d 1185 (8th Cir. 1976), *cert. denied*, 429 U.S. 121 (1977). Accordingly, as a matter of law, a waiver cannot be inferred from Congressional silence.

> It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implsication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of

> governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government.

Graves v. New York ex rel O'Keefe, 306 U.S. 466, 479-80 (1938). *See also M.G. West Co. v. Johnson*, 66 P.2d 1211, 1213 (Ca. Ct. App. 1937) (the doctrine of constitutional immunity announced in *McCulloch* applies when the statute is silent on the issue of taxation).

Without an express waiver of immunity from state income and sales taxation in another statute (and the State cites us to none), Appellees are exempt from such taxes due to their status as Federal instrumentalities. In its brief, the State fails to address this absence of express waiver and attempts to avoid the issue by delving into Congressional intent.

The State's argument is based on the premise that Congress intended to waive Production Credit Associations' immunity through 1985 legislation amending the Farm Credit Act. To accept this premise, one must first accept that an implied waiver of immunity from taxation is sufficient to make a Federal instrumentality subject to taxation. To allow the State to prevail on this theory would require this Court to ignore the long-standing and time-tested doctrine of constitutional immunity, as first announced in *McCulloch v. Maryland*, which permits the State to impose a tax on an instrumentality of the United States only when express, clear, and affirmative legislation allows it to do so.

Moreover, the State's resort to legislative history is inappropriate because the statute at issue, 12 U.S.C.S. § 2077, is not ambiguous. Since it is unambiguous, legislative history is unnecessary because the court must give the unambiguous language its plain meaning. *See. e.g., Fairport. Painesville & E. R.R. Co. v. Meredith*, 292 U.S. 589, 594 (1934); *Wilbur v. U.S.*,

284 U.S. 231, 237 (1931).

The State correctly states that statutory language is frequently capable of more than one interpretation. (Appellant's Brief at 9). However, the State fails to suggest how the statute in question is ambiguous and thus susceptible to more than one interpretation. To create ambiguity, the State attempts to contrast the pre-amendment statute with the post-amendment statute. Because Section 2077 is not ambiguous, prior acts may not be referred to in order to create an ambiguity where none exists on the face of the statute. *See. e.g., Hamilton v. Rathbone*, 175 U.S. 414 (1899); *H. Wetter Mfa. Co. v. U.S.*, 458 F.2d 1033, 1035 (6th Cir. 1972) (where the statute is unambiguous, the court should not depart from its plain meaning to bring about auniformity that is claimed Congress intended but failed to expressly provide).

Even if the Court found the language of 12 U.S.C.S §2077 to be ambiguous, the State's argument still fails since any waiver of immunity requires express, clear, and affirmative legislation.

Furthermore, contrasting Section 2077 before and after the 1985 amendment does not provide a clear indication of Congress' intent. The Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678, 1705 (1985) deleted the last two sentences of Section 2077. Under these sentences, immunity was waived upon retirement of all Production Credit Association capital held by the Governor of the Farm Credit Administration. The legislative history is silent as to the effect this deletion would have on the tax status of Production Credit Associations. The State's position is that Congress intended to withdraw a benefit historically afforded Production Credit Associations and other System institutions. Given the financial dis-

tress the System was experiencing, this position is anomalous.[4] In any event, this inquiry into congressional ,intent is precisely the analysis the Supreme Court deemed unnecessary in *Graves v. New York ex ref. O'Keefe, supra.*

The State offers, as evidence of congressional intent of waiver of tax exemption, a colloquy between members of the House of Representatives that transpired *three years after* the amendment deleting the two sentences. 134 Cong. Rec. H. 462 (daily ed. February 23, 1988) (discussion between Reps. De La Garza and Smith). (Appellant's Brief at 20-21). As such, the colloquy is not part of any legislative history. In fact, post-enactment statements of legislators regarding the meaning or intent of an act merely represent the understanding of individual legislators. *See. e.g., Quern v. Mandley*, 436 U.S. 725 (1978) (holding that post-passage remarks of a Senator in the Congressional Record were of slight probative value because they represented post-hoc observation by a single member of Congress); *Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (refusing to acknowledge Senators' remarks in a colloquy which occurred one year after enactment of the statute and holding that the Senators' remarks could not be the sole guide to interpreting the previously enacted statute, nor could they change the effect of the plain language of the statute itself); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)

[4] Congress passed the 1985 legislation in response to an agricultural depression that had placed the System's financial viability in jeopardy. H.R. No. 99-425, 99th Cong., 1st Sess. 5-11 (1985). In fact, Congress ultimately authorized up to $4 billion in financial assistance to the Farm Credit System in order to preserve its ability to serve as a major source of agricultural credit. Agricultural Credit Act of 1987, Pub. L. 100-233, 101 Stat. 1568, 100 Cong., H.R. 3030 (Jan. 6, 1987), 12 U.S.C.S. §2278b-6 (Supp. 1994) At that time, this constituted the lartest Congressional assistance package ever assembled.

(holding that post-passage remarks of legislators made after statute enacted represented only personal views of those legislators and thus not relevant to meaning of the act); and *National Woodworks Mfg Ass'n v. NLRB*, 386 U.S. 612 (1967) (holding that post enactment statements by legislators inserted into the Congressional Record represented the personal views of those legislators and thus were afforded no probative value).

Even if this discussion could be considered legislative history, it is ambiguous at best. The discussion related to state taxation of real and personal property of Production Credit Associations.[5] The exchange is silent as to state taxes of the types at issue here.

Section 2077 unambiguously states that Production Credit Associations are "instrumentalities of the United States"; it contains no express waiver of immunity from state sales and income taxation; nor does the Act as a whole expressly provide for waiver of Production Credit Associations' tax immunity. Thus, resort to legislative history is unnecessary and it is inappropriate for the State to refer to prior acts for the sole purpose of creating an ambiguity in an otherwise unambiguous statute.

Moreover, if Congress had intended the 1985 amendment to waive Production Credit Associations tax immunity it could have done so expressly. An excellent example of how express waiver of immunity is accomplished is cited by the State. In its brief, the State cites 12 U.S.C.S. § 2214 (Supp. 1994), which clearly provides that the tax exemption granted to the Farm Credit Banks, Federal Land Bank Associations, and Banks for Cooperatives do not extend to service corporations created by these banks:

[5] It should be noted that the *McCulloch* constitutional immunity doctrine does not extend to property taxes. Accordingly, Farm Credit institutions, including Production Credit Associations, have always been subject to property taxes. *See. e.g.*, 12 U.S.C.S. §§ 2023, 2077, 2098 (Supp. 1994).

> State and other laws shall apply to corporations organized pursuant to this part to the same extent such laws would apply to the organizing banks engaged in the same activity in the same jurisdiction: Provided, however, That to the extent that [sections 2023 (Farm Credit Banks), 2098 (Federal Land Bank Associations), and 2134 (Banks for Cooperatives)] may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect -to franchise taxes, shall not extend to corporations organized pursuant to this part.

These service corporations become federally chartered instrumentalities upon the approval of their Articles by the Farm Credit Administration. 12 U.S.C.S. § 2211 (Supp. 1994). Thus, service corporations formed pursuant to Section 2214 are Federal instrumentalities, which would be exempt from state taxation but for Section 2214, which provides for an express waiver of their tax immunity, other than with respect to franchise taxes.

Instead of viewing this statute as the way in which Congress waives tax immunity of a Federal instrumentality, cites this statute in support of its argument that the State Congress intended "that the more specific tax exemption provided for Farm Credit banking institutions in Sections 2023, 2098, and 2134 was not intended to be provided for PCA's in Section 2077." (Appellant's Brief at 22). The State's argument has a fatal flaw. Section 2214 does not apply to Production Credit Associations because Production Credit Associations are not eligible to form service corporations. 12 U.S.C.S. § 2211 (Supp. 1994). Thus, the omission of Production Credit Associations from Section 2214 is perfectly natural and to be expected[6]

As for the difference in the language of the taxation provisions for Federal Land Bank Associations and Farm Credit Banks and Production Credit Associations, it can be said that the-more specific sections for Federal Land Bank Associations and Farm Credit Banks provide an express immunity from taxation while the Production Credit Association section silent. Again, a waiver cannot be inferred from silence. 12 U.S.C.S. § 2077, Production Credit Associations declared to be Federal instrumentalities. The State failed to prove that Congress expressly, clearly, affirmatively waived their exemption. Absent waiver, State cannot constitutionally impose sales and income upon Production Credit Associations.

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[6] In addition, the taxation provision for Banks for Cooperatives, Section 2134, contains language that is identical to the taxation provision for Production Credit Associations, Section 2077. As such, the State is simply incorrect in asserting that the omission of a reference to Section 2077 in Section 2214 shows Congressional intent that Production Credit Associations have a different tax exemption than that provided other Farm Credit banking institutions. There is simply no way that Congress intended for Banks for Cooperatives (Section 2134) to have a more specific exemption than Production Credit Associations (Section 2077) because the language of these sections is identical.

CONCLUSION

Appellees' motion for summary judgment was properly granted. On appeal, the Court should affirm the District Court's finding that Production Credit Associations are Federal instrumentalities, that there is no express, clear, and affirmative consent to Appellant's attempted taxation, and that accordingly, Appellees are exempt from state income and sales taxation.

Respectfully Submitted,

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Dated: June 14, 1995

(Certificate of Service omitted in printing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT
No. 95-1856

Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Association,

Appellees

v.

State of Arkansas

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: November 13, 1995

Filed: February 23, 1996

Before McMILLIAN and LOKEN, Circuit Judges and DUPLANTIER, * Senior District Judge

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DUPLANTIER, Senior District Judge:

Appellees, four Production Credit Associations (PCAs), brought suit in the United States District Court for the Eastern District of Arkansas against the State of Arkansas, seeking a declaratory judgment that they are exempt from state sales and income taxation and for an injunction prohibiting the state from imposing such taxes. The PCAs moved for summary judgment

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*The HONORABLE ADRIAN G. DUPLANTIER, Senior United States District fudge for the Eastern District of Louisiana, sitting by designation.

on the ground that there was no genuine issue of material fact with respect to the issue of whether they were immune from state sales and income taxation because PCAs are statutorily declared instrumentalities of the United States and, absent express Congressional waiver, are entitled to immunity from such state taxation.

The state responded that Congressional declaration of PCAs as federal instrumentalities was insufficient to confer tax immunity and that waiver of immunity should be implied. The state further argued that it was necessary to make a "'actual inquiry into the governmental nature of PCAs in order to determine whether they are federal instrumentalities immune from state taxation. The District Court agreed with the PCAs and granted their motion for summary judgment.

We review the district court's grant of summary judgment de novo, and apply the same standard as applied by the district court. *Langley v. Allstate Ins. Co.*, 995 F.2d 841, 844 (8th Cir. 1993). Summary Judgment is appropriate if the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see.* e g, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-2553, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Langley*, 995 F.2d at 844.

I. PCAs: Federal Instrumentalities Immune from State Taxation Absent Congressional Waiver

Production credit associations are expressly termed federal "instrumentalities" in relevant statutes'[1] and case law[2]. Arkansas concedes that PCAs are federal instrumentalities, but contends obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Arkansas relies upon *United States v. New Mexico* to support its contention that federal instrumentalities like PCAs do not implicitly merit federal immunity from state taxation. Arkansas contends that *New Mexico* dictates that federal instrumentalities like PCAs are immune from state taxation only if, like government contractors, they are so closely connected to

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[1]The statute regarding taxation of production credit associations expressly designates them "instrumentalities" of the United States. In full, 12 U.S.C. § 2077 states:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other that PCAs resemble private corporations, and that the structure and objectives of the PCAs within the farm credit system indicate that their connection to the federal government is not so close as to confer upon them immunity from state taxation.

[2] "The PCA is an instrumentality of the United States. 12 U.S.C. § 2091 (1982)." *Rohweder v. Aberdeen Prod. Credit Assoc.*, 765 F2d 109, 113 (8th Cir. 1985); *see Schlake v. Beatrice Prod. Credit Assoc.*, 596 F. 2d 278, 281 (8th Cir. 1979).

the Government that they "stand in the Government's shoes."[3] Arkansas thus argues that the district court's grant of summary judgment was erroneous; Arkansas should have the opportunity to present factual evidence concerning the function, control, ownership, and operation of the PCAs. We disagree.

Beginning with *M'Culloch v. State of Maryland,* 4 Wheat. 316 (1819), the Supreme Court has repeatedly[4] held that because of the Supremacy Clause of the United States Constitution, states have no power to tax federally created instrumentalities absent Congressional authorization. "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *Id.* at 436.

The proprietary functions and other attributes of the PCAs have no bearing on their status as federal instrumentalities immune from state taxation. The Supreme Court has made it clear that "the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank of Wichita v. Bd. of County Comm'rs*, 368 U.S. 146, 150-51, 82 S.Ct 282, 286, 7 L.Ed.2d 199 (1961) (citing *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 9S, 102, 62

[3] *See infra* note 5.

[4] *See. e.g., United States v. .State Tax Comm'n of Miss.*, 421 U.S. 599, 605, 95 S.Ct. 1872, 1876, 44 L.Ed.2d 404 (1975); *First Agric. Nat. Bank v. State Tax Comm'n*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968), *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966); *see also United States v. City of Columbia,* 914 F.2d 151, 153 (8th Cir. 1990).

S.Ct. 1, 5, 86 L.Ed. 65 (1941)). Arkansas makes no claim that the PCAs or their activities are unconstitutional. Thus, no further review or factual development of the PCAs' functions or objectives is necessary.

Arkansas incorrectly contends that the reasoning of *United States v. New Mexico* applies to PCAs. 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). In *New Mexico,* the Supreme Court clarified the test for determining which government contractors merit immunity from state taxation[5]. The Court granted certiorari solely "to consider the seemingly intractable problems posed by state taxation of federal contractors." 455 U.S. at 730. The Court thus considered and discussed the objectives, functions, and ownership of the contractors in light of the clarified standard after concluding that the contractors were not "instrumentalities" of the United States[6]. *Id.* at 739-40. By contrast, PCAs are federal instrumentalities, clearly designated as such, by federal statutes. Thus *New Mexico* is readily distinguishable as applicable to tax immunity cases involving federal contractors, not Congressionally created federal instrumen-

[5] For such government contractors, "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.. 455 U.S. at 735. In other words, "to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes.'. *Id.* at 736. (citing *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503, 78 S.Ct. 458, 491, 2 L.Ed.2d 441 (1958)).

[6] The Court also noted that the United States, the party seek ing the declaratory judgment that certain advanced funding to the contractors was not taxable by New Mexico,did not claim that the contractors were federal instrumentalities. *Id.* at 725.

talities like PCAs'[7]. Indeed, in *New Mexico*, the Court reaffirmed the rule that federal instrumentalities are exempt from state taxation[8].

II. Congress Made No Express Waiver of the PCAs' Tax Immunity.

In order to subject federal instrumentalities such as PCAs to state taxation, Congress must enact a clear waiver of their exemption. *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966). "[W]here there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981)) (citing *United .States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.

[7]The Ninth Circuit has also distinguished *New Mexico* for similar reasons, noting that the case applied to "mere private contractor[s]," and not to a "United States instrumentality" like the American National Red Cross. *United States v. City of Spokane*, 918 F.2d 84, 87 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1053 (1991).

[8]The Court began its explanation of federal tax immunity with the "one constant" in the discussion: "a State may not, consistent with the Supremacy Clause, U.S. Const., Art. VI, cl. 2, lay a tax "directly upon the United States." *Id.* at 733 (citing *Mayo v. United States*, 319 U.S. 441, 447, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504 (1943)). The Court also quoted an earlier case which stated that if government contractors became "so incorporated into the government structure as to become instrumentalities of the United States," they would "thus enjoy governmental immunity." *Id.* at 736 (quoting *United States v. Boyd*, 378 U.S. 39, 48, 84 S.Ct. 1518, 1524, 12 L.Ed.2d 713 (1964)).

571 (1977)), *aff'd*, 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982). The only congressional enactment which currently deals with state taxation of PCAs states that all notes, debentures, and other obligations of the associations are exempt from state taxes. 12 U.S.C. § 2077 (quoted in full, supra). Prior versions of statutes dealing with taxation of PCAs expressly exempted their "capital, reserves, surplus, and other funds, and their income." Farm Credit Act of 1971, Pub.L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971); Farm Credit Act of 1933, Pub. L. No. 73-75, § 63, 48 Stat. 257, 267 (1933). Arkansas contends that because the current statutory provision no longer contains such additional express waiver language, Congress has waived the PCAs' exemption. The converse can be argued with greater force: the current version of § 2077 acknowledges that because of the Supremacy Clause express exemption of the PCAs from state taxation in the earlier statutes constituted unnecessary surplus language. Where Congress is silent, the tax immunity of federal instrumentalities from state taxation is implied. See *Graves v. New York ex ref. O'Keefe*, 306 U.S. 466, 480, 59 S.Ct. 595, 598, 83 L.Ed. 927 (1939).

There is no provision in any statute, including 12 U.S.C. § 2077, which indicates an intent on the part of Congress to waive the PCAs' tax immunity as federal instrumentalities. Therefore, the PCA's, as instrumentalities of the United States, are immune to state taxation, and we affirm the district court's judgment to that effect.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. It is well-established that States may not tax agencies and instrumentalities of the United States absent Congress's consent. This principle was first articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), when the Court invalidated a discriminatory tax imposed on the Second Bank of the United States. Congress had not addressed the question in the statute, but the Bank's intergovernmental tax

immunity was implied from the Supremacy Clause of the Constitution. *Id.* at 433.

In this century, the limit of this implied immunity has evoked sharp debate among Supreme Court Justices. *See. e.g., First Agric. Nat'l Bank v. State Tax Comm'n,* 392 U.S. 339 (1968); *Graves v. New York ex ref. O'Keefe*, 306 U.S. 466 (1939). But all have agreed on one principle -- it is for Congress to determine (i) which Federal instrumentalities should enjoy Immunity from state and local taxation, *and* (ii) the extent of that immunity. As the Court said in i, 355 U.S. 466, 474 (1958):

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

In no area has the Court more consistently deferred to Congress than in the many cases dealing with state and local taxation of banks and other lending institutions chartered or established under Federal law. ,*See First Agric. Nat'l Bank*, 392 U.S. at 341- 46; *Federal Land Bank v. Board of County Comm'rs,* 368 U.S. 146 (1961); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939). Some of these cases referred to the doctrine of implied constitutional immunity, but all were decided on the basis of careful statutory analysis. In my view, it is that principle of deference to the legislature that should guide us, not this court's potentially mischievous dictum in prior cases to the effect that "Congress must express a clear, express, and affirmative desire to waive" the implied constitutional immunity, supra p.5. With that essential preamble, I turn to the intricacies of the statutes here at issue.

The Farm Credit System is a nationwide network of borrower-owned cooperative lending institutions intended to serve the unique credit needs of the agricultural sector. *See* H.R.

Rep. No. 425, 99th Cong., Ist Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591. The System began in 1916, when the Federal Farm Loan Act authorized the creation of twelve regional Federal Land Banks ("FLBs"). Pub. L. No. 64-158, § 4, 39 Stat. 360, 362 (1916). FLBs were to be partially owned and funded by the Federal government. Both the banks themselves, and their debt obligations, were given a broad statutory exemption from state and local taxes, except real property taxes:

> [E]very Federal land bank . . . including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank .... [F]arm loan bonds issued under the provisions of this Act shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.... Nothing herein shall be construed to exempt the real property of Federal . . . land banks . . . from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Id. § 26, 39 Stat. at 380.

FLBs were only authorized to make agricultural loans secured by first mortgages on farm lands. In 1923, Congress created the Federal Intermediate Credit Banks ("FICBs") to make other types of farm loans. FICBs received the same broad statutory tax exemption as FLBs. Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923). In 1987, Congress merged the FLBs and the FICBs into Farm Credit Banks. With minor changes in statutory language, Farm Credit Banks today enjoy the same statutory tax exemption first granted FLBs in 1916. *See* 12

U.S.C. §2023

This case involves Production Credit Associations ("PCAs"), first created by Congress in the Farm Credit Act of 1933 to provide short-to-intermediate-term loans directly to farmers and ranchers. See Pub. L. No. 73-98, § 20, 48 Stat. 257, 259-60 (1933). PCAs were initially capitalized and owned entirely by the Federal government, but Congress hoped ("expected" might be too strong a word given Depression-era economic conditions) that PCA excess earnings would be used to retire the government's stock, resulting in "local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost." S. Rep. No. 124, 73d Cong., 1st Sess. 2 (1933). Congress reflected that hope in the express but limited tax exemption granted PCAs in the 1933 Act:

> Production Credit Associations . . . and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by [PCAs] shall be exempt both as to principal and interest from all taxation . . . imposed by the United States or by any State, Territorial, or local taxing authority. [PCAs], their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property . . . shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *The exemption provided herein shall not apply with respect to any [PCA] or its property or income after the stock held in it by the [United States has been retired ....*

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). This is a very different exemption than Congress granted the earlier farm credit institutions, FLBs and FICBs. Congress did not explain why it linked the PCAs tax exemption to government ownership, and why it did not also impose that limitation on FLBs and FICBs.[1]."

By the early 1960s, many PCAs were privately owned, and States began assessing various taxes, relying upon the last sentence of the above-quoted statute. Some PCAs resisted, claiming implied immunity as Federal instrumentalities. To my knowledge, every state appellate court to consider the question rejected the PCAs position, concluding that the Federal statute was express consent for state taxation of privately-owned PCAs. *See, e.g., Baker PVA v. StateTax Comm'n,* 421 P.2d 984 (Or. 1966); *Woodland PCA v. Franchise Tax Bd.*, 37 Cal. Rptr. 231 (Diet. Ct. App. 1964); *Montana Livestock PCA v. State*, 393 P.2d 50 (Mont. 1964); *Columbus PCA v. Bowers,* 180 N.E.2d 1 (Ohio), *cert. denied*, 371 U.S. 826 (1962).

By 1968 all PCAs were owned entirely by their borrower-members. *See* H.R. Rep. No. 593, 92d Cong., Ist Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 2091, 2098. When Congress substantially rewrote these statutes in the Farm Credit Act of 1971, it left unchanged the differing exemptions granted to various System lenders. *See* Pub. L. No. 92-181, §§ 1.21,

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[1] The other differences in wording between the exemptions granted to FLBs and PCAs may simply reflect an evolution in drafting. The PCA form of exemption, without the critical last sentence dealing with retirement of the government's stock, is also found in the 1933 statute which created the government-owned Home Owners Loan Corporation. See Pub.. L. 73-43, § 4(c), 48 Stat. 128, 130 (1933).

2.8, 2.17, 3.13, 85 Stat. 583, 590, 597, 602, 608-09 (1971); H.R. Rep. No. 593, 1971 U.:S.C.C.A.N. at 2107-13.[2] I suspect that PCAs operating under the 1971 Act routinely paid state and local taxes in the many States with statutes expressly taxing PCAs to the extent permitted by Federal law,[3] but the record in this case is regrettably silent on the point.

Congress again overhauled the farm credit statutes in 1985, responding to a crisis in the agricultural sector that threatened to bankrupt the System. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648, 650-52 (D.C. Cir. 1992). Congress made the Farm Credit Administration a more independent regulator, led by a three-member Board instead of a Governor. To conform the statute to this new agency configuration, prior references to the Governor needed to be deleted, including one that had been added to the last sentence of the PCAs' tax exemption provision, § 2.17 of the 1971 Act. However, rather than simply delete this reference to the Governor, Congress deleted the last two sentences of § 2.17. *See* Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1678, 1705 (1985). What remained, with minor subsequent changes,[4] was the statutory tax exemption for PCA obligations quoted in footnote I of the court's opinion, now codified at 12 U.S.C. § 2077.

This 1985 amendment deleted the express exemption that had been granted to a PCA and its income for so long as the

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[2] Of the other System lending institutions, Federal Land Bank Associations currently have the same exemption as Farm Credit Banks, 12 U.S.C. § 2098, while Banks for Cooperatives, first created in 1933 along with the PCAs, continue to have the same limited exemption as PCAs, 12 U.S.C. § 2134.

[3] *See. e.g.*, Ala. Code § 40-16-2; Ind. Code § 6-5-12; N.Y. City Inc. Bus. Tax § 31; N.C. Gen. Stat. § 105-102.1; S.D. Cod. Laws § 10-43-2.1; Tenn. Code Ann. §§ 56-4-401 - 03.

[4] This section was reenacted in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1568, 1633 (1987).

PCA was Government-owned. The relevant Committee Report described this as merely a technical change. *See* H.R. Rep. No. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615. Although more than the reference to the Governor was deleted, that is a logical explanation since there were no publicly-owned PCAs in 1985 eligible to enjoy the L. No. 100 deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption, for which no PCA remained eligible, as the grant of a far broader implied exemption. Indeed, depending upon how one applies opaque dictum in the last paragraph of *McCulloch v. Maryland*, 17 U.S. at 436, the effect of this decision may be to exempt PCAs from state and local real property taxes, an exemption broader than *any* Farm Credit institution has enjoyed in the eighty-year history of the System[5]

If normal principles of statutory construction are applied, it is obvious to me that the technical change intended by the 1985 amendments should not be construed as having the extraordinary substantive effect urged by the Appellee PCAs. Because

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[5] The court creates this uncertainty despite a 1988 colloquy between a Member of the House of Representatives and the Member who had been Chairman of the House Committee on Agriculture in 1985:

> MRS. SMITH OF NEBRASKA. Is it your understanding that although local governments are not given specific authority to levy property taxes on property owned by [PCAs], they are not prevented from doing so?
>
> MR. DE LA GARZA. Mr. Speaker, I would inform the gentlewoman from Nebraska that that is the advice of our legal counsel and certainly consistent with my understanding of the [1985] conference.

PCAs had no exemption from state and local taxation before the 1985 amendment (other than the exemption for their obligations), they should have no exemption under the statute as amended, 12 U.S.C. § 2077. But this court concludes otherwise, adhering -- in my view blindly -- to "no express waiver" dicta in earlier cases that discussed the implied constitutional immunity. This decision is illogical, and it is contrary to the overriding rule, grounded in constitutional and statutory principles, that defining the extent of federal instrumentality tax immunity is a quintessentially legislative task. Accordingly, I dissent.

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134 Cong. Rec. H 462 (daily ed. Feb. 23, 1988). Although postenactment views of individual legislators are not usually reliable indicators of legislative intent, the House in 1988 was considering whether a further technical amendment was needed to clarify that PCAs, like all other Farm Credit System banks, are subject to real property taxation. So this colloquy is quite persuasive support for my interpretation of the 1985 amendment.

CERTIORARI GRANTED

95-1918 ARKANSAS V. FARM CREDIT ., ET AL.

The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: "Should the case have been dismissed by the district court for lack of subject matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. Section 1341?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 28, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 28, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 9, 1997. Rule 29.2 does not apply.

No. 95-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTAPRODUCTION CREDIT ASSOCIATION

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Whether the case should have been dismissed by the district court for lack of subject matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. Section 1341.

Whether Production Credit Associations are exempt from taxation by the State of Arkansas either as federal instrumentalities or by 12 U.S.C. § 2077.

LIST OF PARTIES

The parties to this proceeding are as follows: The Petitioner is the State of Arkansas. The Respondents are four Production Credit Associations chartered by the Farm Credit Association, including Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Association.

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In the Supreme Court of the United States
OCTOBER TERM, 1996

No. 95-1918

STATE OF ARKANSAS, PETITIONER

V.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, *et al.*
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (J.A. 139) is reported at 76 F.3d 961 (1996). The Order of the United States District Court of the Eastern District of Arkansas, Western Division, (J.A. 73) is unreported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Eighth Circuit was entered on February 23, 1996. The petition for a writ of certiorari was filed on May 22, 1996, and was granted on January 17, 1997. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides in pertinent part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . .

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1341 provides:

The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

12 U.S.C. § 2077 provides:

Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

STATEMENT

Respondents, four Production Credit Associations (PCAs) are cooperative credit institutions chartered by the Farm Credit Administration to provide financial services to borrowers, primarily for agricultural purposes, rural housing, and farm related purposes. Each of the PCAs is located in Arkansas. The stock of the corporations is owned by the members who are the borrowers. The PCAs filed the appropriate returns and paid corporate income tax and sales tax to the State of Arkansas from the time they were chartered.[1]

In 1994, the four PCAs requested that the State of Arkansas, through the Commissioner of Revenues, recognize that they, as federal instrumentalities, are exempt from state income and sales tax, and stated that as a result of the exemption, the taxes paid by the PCAs in 1991, 1992, 1993 and 1994 had been paid in error. J.A. 5-6.

The Department denied the PCAs' request for an exemption from state taxation based upon federal statutory authority, legislative history, and the structure and function of PCAs which more closely parallel that of private corporations than of federal instrumentalities. The Department also denied the PCAs' request for a refund of the taxes paid by the PCAs in 1991 through 1994.

In June 1994, the PCAs instituted this action in the United States District Court for the Eastern District of Arkansas seeking a declaratory judgment that, as federal instrumentalities, they were exempt from state and local taxes, including income tax and gross receipts (sales) tax, and an injunction against the imposition or assessment of such taxes by the State

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[1] Farm Credit Services of Central Arkansas, PCA began paying state sales and income taxes in 1991. The other three PCAs apparently began paying at approximately the same time. Each likely paid state taxes prior to that time under the name of a predecessor organization. J.A. 6.

of Arkansas. J.A. 1. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and Article Six, Clause Two of the Constitution of the United States. J.A. 2.

The PCAs did not dispute in the district court that Arkansas' state law remedy was plain, speedy and efficient. Conversely, in August 1994, the PCAs filed a suit in the Chancery Court of Pulaski County, Arkansas for refund of the taxes pursuant to Ark. Code Ann. § 26-18-507, which provides judicial relief in chancery court from the denial of a refund request.[2]

Arkansas filed a motion to dismiss the declaratory judgment action, alleging, in part, that the suit was barred by the Tax Injunction Act. J.A. 15. In December 1994, the PCAs filed a motion for summary judgment alleging that the constitutional doctrine of the implied immunity of federal instrumentalities from state taxation immunized the PCAs and that Congress had not expressly waived the immunity of PCAs. J.A. 28.

On March 7, 1995, the district court entered its order which denied Arkansas' motion to dismiss and granted the PCAs' motion for summary judgment. The district court held that the Tax Injunction Act did not apply, citing *Department of Employment v. United States*, 385 U.S. 355 (1966), a suit filed by the United States rather than by the instrumentality on its own behalf. The court held that PCAs are federal instrumentalities from which arises an implied immunity from state taxation. The court further held that this immunity must be expressly waived by Congress and that the court did not find such express waiver. J.A. 73-76.

Arkansas appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit. J.A. 77.

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[2] The PCAs filed a motion for summary judgment in the state court case following the entry of the Eighth Circuit opinion holding PCAs exempt from all state taxation. this motion was denied pending the outcome of this case; however, the order denying the motion has apparently not yet been entered.

The Court of Appeals for the Eighth Circuit affirmed the decision of the district court, on February 23, 1996. J.A. 139-. The court held that, as federal instrumentalities, PCAs are immune from all taxation, regardless of their structure and function. J.A. 142 The court further held that any waiver of this immunity must be expressly stated by Congress and that nothing in 12 U.S.C. § 2077 indicates the intent of Congress to waive the immunity. J.A. 144-145. Judge Loken dissented, finding that the decision was contrary to the principle of deference to Congress. J.A. 146. He asserted that the court's opinion construed a technical amendment, which repealed an express exemption no longer available to any PCA, as granting a more extensive implied exemption from state taxation to PCAs. J.A.151.

Arkansas filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the Eighth Circuit which held PCAs immune to state taxation as federal instrumentalities. This Court granted certiorari, requesting that the parties brief the additional question of whether the district court should have dismissed the case for lack of subject matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. § 1341.

SUMMARY OF ARGUMENT

The Tax Injunction Act, 28 U.S.C. § 1341, was enacted to provide freedom from federal court interference with state taxation by providing for state rather than federal court resolution of disputes between a state and a taxpayer over state taxation, provided state law affords a "plain, speedy and efficient" remedy to the taxpayer in state court.

The United States is exempt from the provisions of the Tax Injunction Act. *Department of Employment v. United States*, 385 U.S. 355 (1966). The Act itself does not specifically exempt the United States. However, courts have created this judicial exemption based upon the common law principle that the sovereign is not subject to restrictive legislative enactments,

unless by its terms, the enactment so provides. Courts have also considered the inability of the United States to appropriate funds to pay the tax under protest, as required by most state law measures, to be an additional rationale for exempting the United States from the requirement that it litigate state tax law disputes in state court.See generally, *United States v. Livingston,* 179 F. Supp. 9(E.D.S.C. 1959) aff'd without opinion, 364 U.S. 281 (1960).

The judicially created exemption for the United States was considered to apply to the United States when it asserted that its interests were at stake. Courts allowed the United States access to district court to challenge state taxation not only on its own behalf, but also on behalf of a federal instrumentality, and on behalf of a third party with whom the government has a relationship. Courts have generally been more reluctant to find that the Tax Injunction Act did not bar jurisdiction when various federal instrumentalities attempted, on their own behalf and without the assistance of the United States, to challenge state taxation in district court. However, Indian tribes, federal reserve banks, and the FDIC, among others, have been permitted to proceed in district court on their own behalf. In the majority of these cases, the court employed an additional jurisdictional basis for holding that the Tax Injunction Act did not bar the action. Some of those bases included a specific statute providing for federal court jurisdiction over the instrumentality, *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 (1976), or the important governmental functions performed by the instrumentality. *Federal Reserve Bank of Boston v. Comm. of Corporations,* 499 F.2d 60 (CA1 1974).

Production Credit Associations do not qualify for the exemption afforded the United States. The United States did not appear in this proceeding to assert that its interests, as carried out through PCAs, was at stake. Congress did not grant PCAs access to federal court statutorily. PCAs are not "governmental" corporations; their structure, form, and function much more closely parallel that of private corporations than of "arms of

the Government." *Department of Employment v. United States* 385 U.S. 355 (1966).

For the foregoing reasons, the District Court should have held that jurisdiction was barred by the Tax Injunction Act and dismissed the case.

For many of the same reasons, the lower court's decision that the doctrine of implied immunity of federal instrumentalities from state taxation automatically exempts PCAs from taxation is erroneous. This doctrine had its origins in *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819), construing the Supremacy Clause. Originally, based upon principles of sovereignty, it exempted Federal and state governments from the ability of the other to tax. The doctrine originally enjoyed a broad application, followed by a more restrictive interpretation.

Although it has been some time since this Court has specifically considered the issue of whether an entity named a federal instrumentality by Congress is exempt from state taxation, this Court's precedents, in considering the issue in relation to third parties contracting with the government, suggest that in order for the immunity to apply, the instrumentality must "stand in the Government's shoes." *United States v. New Mexico,* 455 U.S. 720, 736 (1982). PCAs, as previously explained, are not sufficiently governmental to meet this standard.

Additionally, Congress acted from the time PCAs were created to provide them with an express exemption from taxation. Originally, the exemption provided broad immunity from both state and federal taxation, excepting only their real property from the exemption. However, the statute also specifically waived the broad exemption at the time PCAs became privately owned.

In 1985, in a significant amendment to the Farm Credit Act, Congress amended the PCA taxation statute, by deleting both the express exemption and the waiver of exemption, leaving the language in the present statute. Legislative history indicates that this amendment was part of a technical correction to

remove references to the Governor, a position which was abolished by the amendments.

Although the present statute exempts the notes, debentures, and obligations issued by PCAs, it does not confer the broad immunity from state taxation construed by the lower courts.

ARGUMENT

1. The District Court should have dismissed this case, because the Tax Injunction Act, 28 U.S.C. § 1341, deprived the district court of jurisdiction over the suit filed by four Production Credit Associations for a declaratory judgment that they were exempt from taxation by the State of Arkansas.

The Tax Injunction Act, 28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act deprives federal courts of jurisdiction to issue declaratory relief holding state tax laws unconstitutional as well as to enjoin the collection of state taxes when state law provides a plain, speedy and efficient remedy. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982).

a. The State of Arkansas provides a taxpayer with an opportunity for a full hearing and judicial determination at which time any constitutional objections to a state tax may be raised.

Arkansas law provides a refund procedure for a taxpayer who paid a state tax through error of fact, computation, or mistake of law. The tax is refunded if the Department of Finance and Administration determines, based upon an amended return or a

verified claim for refund filed by the taxpayer, that the tax was erroneously paid. The taxpayer may file suit in chancery court if the director denies the refund request, in whole or in part, or fails to timely render a decision on the refund request. Ark. Code Ann. § 26-18-507.[3]

Arkansas law also provides for judicial relief in chancery court from an administrative decision adverse to the taxpayer who contests an assessment of state tax. The taxpayer may file suit in chancery court after either paying the tax under protest or filing a bond in double the amount of the deficiency. Ark. Code Ann. § 26-18-406.[4]

Any refund due the taxpayer is paid with interest at the rate of ten percent (10%) per annum. Ark. Code Ann. § 26-18-508(3).

The Arkansas Supreme Court has held that the State's sovereign immunity has been waived by Ark. Code Ann. § 26-18-507 which allows a taxpayer to sue the State upon the State's denial of, or failure to act upon, a claim for refund. *State v. Staton*, 325 Ark. 341, 344, 925 S.W.2d 418 (1996) (substituted opinion on rehearing). The Arkansas Supreme Court has also held that Ark. Code Ann. § 26-18-406 provides the exclusive method for challenging an assessment of tax deficiency. *Taber v. Pledger*, 302 Ark. 484, 791 S.W.2d 361, 363 (1990), cert. denied 498 U.S. 967 (1990).

Arkansas' state law remedy provides a taxpayer with the "full hearing and judicial determination" held to provide a "plain, speedy and efficient" state law remedy as required by *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514-15 (1981).

The PCAs did not assert in the district court that Arkansas lacked a plain, speedy and efficient state law remedy. Conversely, shortly after the PCAs filed this suit in district court,

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[3] Ark. Code Ann. § 26-18-507 is printed in its entirety at Appendix A.

[4] Ark. Code Ann. §26-18-406 is printed at Appendix B.

they filed suit in state court for refund of state income and gross receipts (sales) taxes, citing Ark. Code Ann. § 26-18-507 as the basis for their cause of action.[5] In their response to Defendant's allegation that the district court lacked jurisdiction due to the Tax Injunction Act, J.A. 20, the PCAs cited federal court decisions which had conferred jurisdiction over federal instrumentalities suing on their own behalf, J.A. 26, and did not allege that Arkansas' state law remedy was not adequate.

b. Soon after the enactment of the predecessor to the Tax Injunction Act, federal courts created an exemption to the Tax Injunction Act for the United States when it asserts that its interests are at stake.

In *City of Springfield v. United States*, 99 F.2d 860 (CA 1 1938) the Circuit Court of Appeals for the First Circuit held that 28 U.S.C.A. § 41(1)[6] did not bar federal court jurisdiction of a suit brought by the United States to enjoin collection of a real property tax imposed by a Massachusetts city against the United States. 99 F.2d at 862. The court held that the statute did not apply to the United States, based in part on the conclusion that a remedy which required an appropriation as a condition precedent to relief was not adequate as to the United States, since it could not constitutionally appropriate money to pay the tax and then seek a refund. *Id.*

Following an amendment which codified the statute at 28

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[5] The Chancery Court of Pulaski County, Arkansas denied the PCAs' motion for summary judgment pending the outcome of this case.

[6] 50 Stat. 728, enacted on August 21, 1937, provided that "no district court shall have jurisdiction of any suit to enjoin the collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of that state."

U.S.C. § 1341 with insignificant changes in the language, the Second Circuit held that § 1341's bar to jurisdiction did not apply to the United States, based upon legislative history and because the section did not specifically mention the United States.[7] *United States v. Woodworth*, 170 F.2d 1019, 1020 (CA 2 1948)

The reasons enunciated in *City of Springfield* and in *Woodworth* for exempting the United States from the jurisdictional bar of the Tax Injunction Act were approved in *United States v. Livingston*, 179 F.Supp. 9, 12 (E.D.S.C. 1959), aff'd without opinion, 364 U.S. 281 (1960). In *Livingston*, unlike *Springfield* and *Woodworth*, which had involved a tax on real property owned by the government, the action was brought by the United States to enjoin collection of South Carolina sales and use taxes from a private corporation which contracted with the Atomic Energy Commission.

The Tenth Circuit, employing similar reasoning to that in *Livingston*, reversed the district's court's dismissal and allowed the United States and Phillips Petroleum Company to proceed in a federal court action for a declaratory judgment and for a refund of taxes paid under protest by Phillips, which processed and sold uranium to the Atomic Energy Commission. *United States v. Bureau of Revenue of State of New Mexico*, 291 F.2d 677 (CA10 1961).

c. Federal courts have continued to recognize the exemp-

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[7] The Court cited *United States v. United Mine Workers*, 330 U.S. 358, 272 (1947) for the proposition that had Congress intended the United States to be subject to the statute, it would have expressly declared that intent in the statute. The *United Mine Workers* opinion gives due consideration to an old rule and precedent that the sovereign will not be deemed subject to a restrictive statute "without express words to that effect,...." 330 U.S. at 272.

tion from the Tax Injunction Act for the United States but have rarely extended the exemption to federal instrumentalities suing on their own behalf, absent other reasons such as a separate statutory basis for jurisdiction.

This Court, agreeing with lower court authority, and based upon the legislative history of the Tax Injunction Act, held that the Act did not prevent the United States from filing suit on behalf of the Red Cross in federal court for an injunction against state taxation, which the Court held was sufficiently governmental to be a tax immune federal instrumentality. *United States v. Department of Employment*, 385 U.S. 355, 357-58 (1966).[8]

In one of the first cases allowing a federal instrumentality to proceed in district court without the United States as a party, the Ninth Circuit held that the district court had jurisdiction of an action brought by an Indian tribe, independently of the United States, to enjoin the assessment, levy and collection of state possessory interest tax. *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (CA9 1971), cert. denied 405 U.S. 933 (1972). The court analyzed, in announcing the "co-plaintiff" exemption, that the reasons for allowing an exemption from the Tax Injunction Act for the United States were equally persuasive when the exemption was sought by Indians, the beneficial owner of lands held in trust by the

[8] Almost twenty years after *Department of Employment*, the United States District Court for the Western District of Michigan recognized its continuing validity in *United States v. State of Michigan*, 851 F.2d 803 (CA6 1988) in a suit brought by the United States seeking a declaratory judgment that federal credit unions are immune from state sales taxes as federal instrumentalities.

United States, which Indian lands were federal instrumentalities. 442 F.2d at 1185-86.[9]

The First Circuit refused to extend the holding in *Agua Caliente* to "all situations where an instrumentality brings a suit ... independently of the United States," concluding that the instrumentality in *Agua Caliente*, an Indian tribe, occupied a "unique place in federal law." *United States v. State Tax Commission*, 481 F.2d 963, 975 (CA1 1973). The district court allowed six federal savings and loan associations to intervene, in a suit filed by the United States on behalf of the Federal Home Loan Bank Board seeking declaratory relief against the deposits tax, and to assert an additional claim not asserted by the United States for declaratory relief against the income tax. The First Circuit held that the United States' presence in challenging the deposits tax did not grant jurisdiction to the intervenors, recognized by the Court as federal instrumentalities, to challenge the income tax, not challenged by the United States. 481 F.2d at 975.

The following year, the First Circuit reached a different result with respect to a different federal instrumentality, a federal reserve bank. *Federal Reserve Bank of Boston v. Commissioner of Corporations and Taxation*, 499 F.2d 60 (CA1 1974). The Court carefully considered the structure and governmental functions of federal reserve banks and found that as "fiscal arms of the federal government,"[10] they should be allowed to pro-

[9] The Ninth Circuit applied the co-plaintiff instrumentality exemption to the jurisdictional bar of 28 U.S.C. § 1341 to hold that the district court had jurisdiction over challenges to state taxation brought by members of Indian tribes. *Moses v. Kinnear*, 490 F. 2d 21 (CA9 1973).

[10] Some of the factors which the Court considered relevant were the lack of profit to shareholders, the absence of commercial banking services, their function as depositories for money held in the United States Treasury and service to the Treasury, as

ceed in federal court without a "symbolic joinder by the United States." In so holding, the court recognized that, rather than adopting a bright line test for exemption of federal instrumentalities from the Tax Injunction Act, it was advocating analysis, instrumentality by instrumentality, of the instrumentality's governmental role, as well as analysis of relevant legislation affecting federal court jurisdiction of the instrumentality. 499 F.2d at 64.

This Court upheld the decision of the District Court for the District of Montana holding that jurisdiction over suits brought by the Salish and Kootenai Tribes attacking cigarette sales taxes and personal property taxes was not barred by the Tax Injunction Act. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976). The district court had based its finding of jurisdiction, in part, on an expanded version of the instrumentality doctrine,[11] as well as a statute, 28 U.S.C. § 1362, providing for federal court jurisdiction over all actions brought by Indian tribes arising under the Constitution, laws, or treaties of the United States. This Court examined the legislative history of § 1362 to determine whether § 1362 provided an exemption from the provisions of § 1341, and concluded that § 1362 allowed Indian tribes suing under its provisions to proceed as would the United States appearing in their behalf. The exemption from § 1341 afforded to the United States would thus accrue to Indian tribes under § 1362. Jurisdiction was upheld based upon § 1362 rather than upon the district court's expanded version of the instrumentality doctrine. 425 U.S. at 472-474.

The jurisdictional analysis of *Moe* was employed by the District Court for the District of Connecticut in holding that a suit by fiduciaries of the Railroad Employees National Dental Plan to enjoin a tax which violated ERISA was not barred by the Tax Injunction Act. *National Carriers' Conference Committee v. Heffernan*, 440 F.Supp. 1280 (D.C.D.Conn. 1977). The district court held that because the United States could have brought the suit, and a specific jurisdictional statute contained in ERISA allowed a private plaintiff to sue to enjoin violations of ERISA on the same basis as the Secretary of Labor, jurisdiction was not barred. 440 F. Supp. at 1284.[12]

The Ninth Circuit, which had previously announced the co-plaintiff exemption in *Agua Caliente*, held that the district court did not have jurisdiction over an action challenging state taxation brought by a city public housing agency created pursuant to federal law, in the absence of the United States as a party. *Housing Authority of Seattle v. State of Washington*, 629 F.2d 1307 (CA9 1980). The Court reviewed the First Circuit's decision in *State Tax Commission*, that the Tax Injunction Act barred federal savings and loan associations from suing on their own behalf in federal court, as subsequently modified by its decision allowing a federal reserve bank to sue on its own behalf in *Federal Reserve Bank*. Without deciding whether it agreed with the First Circuit that there are federal instrumentalities entitled to proceed without the United States, the court held that the public housing agencies attempting to claim the exemption were not sufficiently integrated into the structure of the government to allow them the benefit of the exemption.

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well as a special jurisdictional stature for federal reserve banks, 12 U.S.C. § 632. 499 F.2d at 62-63.

[11] In its opinion, the district court indicated that federal court jurisdiction was not barred by § 1341 over "persons or entities in which the United States has a real and significant interest." 425 U.S. at 471.

[12] In a subsequent decision, the Supreme Court indicated in dicta that in order for the ERISA jurisdictional statute to operate as an exception to the Tax Injuction Act, the party claiming jurisdiction thereunder can prove that the state remedy is not speedy or efficient, or that the jurisdictional statue was intended to be an exception to the Act. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 (1983).

629 F.2d at 1311-12. The court further recognized that the *Moe* decision clarified the exemption from § 1341 for Indian tribes as arising from the jurisdictional grant of 28 U.S.C. § 1362, rather than from the federal instrumentality doctrine. As a result, the co-plaintiff exemption of *Agua Caliente* and *Moses* was no longer applicable to parties other than Indian tribes. 629 F.2d 1312-13.

Although the district court had held it had jurisdiction and the issue was not presented on appeal, the Fifth Circuit briefly addressed the issue of why jurisdiction was not barred in a challenge of city special assessments by the FDIC. *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (CA5 1991). Citing *Department of Employment* and *Federal Reserve Bank*, the Court held that FSLIC and FDIC are federal agencies exempt from § 1341.[13]

The Second Circuit, confronted with the same issue and the same instrumentality shortly after the *New Iberia* decision, affirmed the district court's decision that the Tax Injunction Act barred federal court jurisdiction over a suit brought by the FDIC. *Federal Deposit Insurance Corporation v. State of New York*, 928 F.2d 56 (CA2 1991). The court found that the FDIC's suit was intended to protect commercial banks, against whom the taxes had been assessed, rather than the federal government, and that the effect of the State tax assessments on the federal government would be minimal. The FDIC argued, in reliance on *Moe*, that the federal instrumentality exemption could apply even when the instrumentality was not the entity being taxed. The court refused to read *Moe* so broadly, finding no "trustee" relationship between the FDIC and commercial banks like that

[13] The court also cited 12 U.S.C. § 1730 (k) (1), a statue then in effect but subsequently repealed by Pub. L. 101-73, Title IV, § 407, Aug. 9, 1989, 193 Stat. 363, which provided for original jurisdiction in district court, as well as a removal provision, for all civil actions in which FSLIC was a party.

between the Tribes and the United States in *Moe*. 928 F.2d at 60. In holding that the FDIC could not invoke the federal instrumentality exemption, the court stated that to hold otherwise would "be starting down a road leading toward use of the exception by any taxpayer whose operations were affected by congressional regulation. Taking this path would result in the erosion of the exception altogether." 928 F.2d at 61.

The First Circuit, in recognition of its precedent of examining the governmental role and relevant legislation relating to an instrumentality attempting to claim the exemption, held that the FDIC, as receiver for an insolvent bank, did not qualify for the exemption. *Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600 (CA1 1993). The FDIC, as receiver for the Bank, removed a tax dispute from state court to district court pursuant to the FDIC removal statute,[14] and the District Court remanded on the basis that § 1341 required the District Court to abstain. The First Circuit, disagreeing that abstention was the correct basis for the remand, reviewed the decisions of the Second Circuit in *New York* and the Fifth Circuit in *New Iberia*, which disagreed as to whether the FDIC was entitled to the benefit of the federal instrumentality exemption from the Tax Injunction Act.[15] Based upon the FDIC's role as receiver for a private bank and the absence of statutory language granting

[14] 12 U.S.C. § 1819 (b) (2) (B) provides that the FDIC may remove any suit from a State court to district court.

[15] The Court also reconized that the District Court for the District of Colorado held that FDIC is not a federal instrumentality for purposes of the Tax Injuction Act. *Pima Financial Service Corporation v. Intermountain Home Systems*, 786 F. Supp. 1551, 1560 (D. Colo. 1992).

FDIC agency status for purposes other than 28 U.S.C. § 1345[16], the court held that the FDIC was not entitled to the federal instrumentality exemption. The court then found it necessary to resolve what it perceived to be a jurisdictional conflict between the removal statute and the Tax Injunction Act. Finding no clear evidence in legislative history that the removal statute was intended as an exception to the Tax Injunction Act, the Court affirmed the District Court's remand of the case to State court. 986 F.2d at 604.

The Third Circuit, agreeing with the decision in *New Iberia*, held that the FDIC qualified for the federal instrumentality exception to the Tax Injunction Act. *Simon v. Cebrick*, 53 F.3d 17, 22 (CA3 1995). The Court distinguished the decisions of the First and Second Circuits in *Clark* and *New York* by finding that the governmental role of the FDIC in those cases was minimal, unlike the FDIC's role in the instant case of winding up the affairs of failed institutions pursuant to federal statutory authority. 53 F.3d at 22-23.

d. Neither the reasons for exempting the United States from the Tax Injunction Act, nor the justifications for allowing federal instrumentalities to sue on their own behalf, apply to PCAs.

The United States District Court for the Eastern District of Arkansas denied the State of Arkansas' Motion to Dismiss, holding that the Tax Injunction Act does not apply to "suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction," quoting *Department of Employment v. United States*, 385 U.S. 355 (1966), a suit brought by the United States on behalf of the Red Cross. J.A. 74.

[16] 28 U.S.C. § 1345 provides for district court jurisdiction over all actions brought by the United States or by any agency or officer authorized to sue by Congress.

None of the rationales employed by federal courts for extending the exemption of the United States from the Tax Injunction Act to federal instrumentalities suing on their own behalf apply equally to PCAs. They neither occupy "a unique place in federal law,"[17] like the Indian tribes, nor has Congress granted them access to federal court statutorily.[18] To the contrary, prior to an amendment in 1975, federal court jurisdiction was prohibited to PCAs by 12 U.S.C. § 2258, which provided:

> Each institution of the System shall for the purposes of jurisdiction be deemed to be a citizen of the State, commonwealth, or District of Columbia in which its principal office is located. No district court of the United States shall have jurisdiction of any action or suit by or against any production credit association upon the ground that it was incorporated under this Act or prior Federal law, or that the United States owns any stock thereof, nor shall any district court of the United States have jurisdiction, by removal or otherwise, of any suit by or against such association except in cases by or against the United States or by or against any officer of the United States or against any person over whom the courts of the State have no jurisdiction, and except in cases by or against any receiver or conservator of any such association appointed in accordance with the provisions of this Act.

The legislative history indicates that the Governor of the Farm Credit Administration requested the amendment to allow PCAs

[17] 481 F.2d at 975

[18] See *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 474 (1976). by contrast, Part A- Production Credit Associations of Chapter 23 of Title 12, U.S.C. §§ 2071 - 2077, contains no provision for federal court jurisdiction over PCAs.

access to federal courts to enforce liens on fishing boats called "preferred ship mortgages," jurisdiction of which was exclusively in Federal district courts under the Maritime laws. See Sen. Rep. No. 94-554, 94th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. & Admin. News 2148-2156. The effect of the amendment, as reflected in the legislative history, would be to give PCAs the same access to district court allowed to "private citizens, corporations, and other legal entities." *Id.*, at 2150.

Unlike the federal reserve banks, held to be "fiscal arms of the federal government,"[19] PCAs do not provide fiscal services to the government. PCAs' shareholders may participate in patronage dividends,[20] unlike federal reserve banks whose surplus earnings are available to the United States Treasury.[21] Other factors which the First Circuit found persuasive to confirm the governmental role of federal reserve banks were that the bank's shareholders lacked the powers and rights of shareholders of private corporations, the absence of ordinary commercial banking services provided by federal reserve banks, and their ability to make policy with the Board of Governors of the Federal Reserve System, whose members are appointed by the President.[22] Conversely, the shareholders and the members of the boards of directors of PCAs are the borrower farmers or ranchers.[23] PCAs make short term loans to their borrowers,

[19] 499 F.2d at 62.

[20] See 12 U.S.C. § 2074 (c), allowing distributions from available net earnings, on a patronage basis in stock, participation certificates, or cash.

[21] See 499 F.2d at 62.

[22] In addition to these factors, the court acknowledged that 12 U.S.C. §632, a statute providing for federal jurisdiction over federal reserve banks, weighed in favor of allowing the federal reserve banks to proceed without the United States as a party. See 499 F.2d at 62-63.

[23] See 12 U.S.C. §§ 2071, 2072, and 2073.

similar to the loans made by commercial lenders. PCAs may borrow money from the Farm Credit Bank, and may borrow from and issue notes to any commercial bank or other financial institution.[24] Although PCAs are "federal instrumentalities,"[25] their governmental role is minimal. The First Circuit, in deciding that federal reserve banks should be allowed to proceed in federal court without "the separate support of the Attorney General," explained that the court, when previously analyzing whether federal savings and loan associations were exempt from the Tax Injunction Act, "had in mind that if a sufficient threat to federal sovereignty were to arise, the Attorney General would presumably lend the umbrella of the United States, thus permitting access to the federal courts; ..." 499 F.2d at 62. Clearly the structure, function, and operation of PCAs more closely parallels that of federal savings and loan associations who were not allowed to sue on their own behalf,[26] than that of federal reserve banks, who were allowed to sue on their own behalf.[27] Several courts have considered the inability of the United States to appropriate funds to pay a tax before suing for refund, as required by most state law remedies, to be a compelling reason

[24] See 12 U.S.C. §2073 (12). Farm Credit Banks obtain their loan funds primarily through the sale of debt securities. These debt securities are not obligations of or guaranteed by the United States or any agency or instrumentality other than the Farm Credit System banks. See Farm Credit Administration 1994 Annual Report page 34.

[25] 12 U.S.C. § 2071 (a) provides, "Each production credit association shall continue as a Federally chartered instrumentality of the United States."

12 U.S.C. § 2077 provides, in relevant part, "Each production credit association and its obligations are instrumentalities of the United States..."

[26] *State Tax Commission*, 481 F.2d at 975.

[27] *Federal Reserve Bank*, 499 F.2d at 64.

for refusing to apply the bar of the Tax Injunction Act to the United States. This rationale would apply equally to a federal agency or instrumentality which relies entirely on government funds, but not to PCAs, whose funds are derived from private rather than governmental sources.[28]

Based upon the foregoing, the district court should have held that the Tax Injunction Act divested it of jurisdiction over PCAs suing on their own behalf and dismissed the case.

2. Assuming, *arguendo*, that the district court had jurisdiction, both the district court and the Circuit Court of Appeals for the Eighth Circuit erred in holding that PCAs are exempt from all taxation by the State of Arkansas.

The district court held that PCAs are exempt, as federal instrumentalities, from all state taxation, and that, in the absence of an express waiver of such exemption by Congress, they are not subject to taxation by the State of Arkansas. J.A. 73-76. In affirming the District Court decision, the Court of Appeals for the Eighth Circuit held that language in prior versions of the statute addressing taxation of PCAs, which provided additional exemptions to those contained in the present version of the statute as well as an express waiver of those additional exemptions, constituted "unnecessary surplus language" because of the implied immunity of federal instrumentalities from state taxation. J.A. 145.

a. PCAs are not sufficiently "governmental" to be entitled to the benefit of the doctrine of implied immunity of federal instrumentalities from state taxation.

The doctrine of the immunity of federal instrumentalities from

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[28] See note 24, *supra*.

state taxation arose from the opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) written by Chief Justice Marshall. The Court's opinion construed the Supremacy Clause of the Constitution to forbid taxation of the Bank of the United States by Maryland. 17 U.S. at 436.

Decisions subsequent to *McCulloch* expanded the absolute immunity of the United States and its instrumentalities from state taxation, including interest income on federal government bonds,[29] income taxes on the wages of Federal employees,[30] and a state gross receipts tax on federal contractors.[31] This trend toward expansion of the immunity doctrine continued until this Court's decision in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), upholding a nondiscriminatory tax on the gross proceeds received by a private contractor pursuant to a contract with the federal government.

A year after *Dravo*, this Court held that a State income tax on the income of employees of the Home Owners' Loan Corporation, a federal instrumentality, did not unconstitutionally burden the federal government. *Graves v. New York*, 306 U.S. 466, 487 (1939). Although Congress specifically exempted the Home Owners' Loan Corporation, its bonds, its franchise, capital, reserves and surplus, and its loans and income from state taxation, the statute did not either immunize or waive immunity of the salary of the corporation's employees from state taxation. The Court found no implied immunity from the tax in the silence of Congress, so long as the tax did not unconstitutionally burden the government. *Id.*

In 1982, considering the extent to which federal contractors were subject to state taxation, this Court determined that "the

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[29] See, e.g., *Weston v. City Council*, 27 U.S. (2 Pet.) 449 (1829).

[30] See e.g. *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842).

[31] See e.g., *Panhandle Oil Company v. Mississippi*, 277 U.S. 218 (1928).

confusing nature of our precedents" required the Court to reexamine the doctrine of federal immunity from state tax. *United States v. New Mexico*, 455 U.S. 720, 733 (1982). The Court found tax immunity appropriate only "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." 455 U.S. at 735.

The majority of the relevant federal cases which have considered whether federal instrumentalities, rather than private parties contracting with the government, were immune from state taxation have held that the instrumentalities were immune from legally incident state taxes. In many of these decisions the instrumentality was held immune, based upon factors other than the doctrine of the implied immunity of federal instrumentalities. For example, the Red Cross was held exempt based upon the governmental nature of the instrumentality,[32] as were Federal credit unions.[33] Federal land banks were held exempt

[32] Factors such as the Red Cross' obligation to perform a wide variety of functions essential to the armed forces, its receipt of substantial material assistance from the Federal Government, and its recognized "status virtually as an arm of the Government," apparently convinced the court that the Red Cross was a tax immune instrumentality. *Department of Employment v. United States*, 385 U.S. 355, 357-358 (1966).

[33] Federal credit unions were held immune from Michigan sales taxes on their purchases following consideration of the purposes for which Federal credit unions were created, whether they continued to perform that function, and the extensive and unusual federal regulatory supervision of their creation and activities. *United States v. State of Michigan*, 851 F.2d 803,807 (CA 6 1988).

based upon a statute exempting the banks from taxation,[34] as were national banks.[35]

Although this Court has not directly addressed the implied immunity of an entity named a federal instrumentality by Congress in recent years, this Court's precedents addressing the issue in the context of private parties contracting with the federal government suggest that immunity of federal instrumentalities from state taxation will not be implied in the absence of factors which make the instrumentality "governmental." Logic dictates that applying an immunity originated in *McCulloch* to prevent "clashing sovereignty"[36] to an entity which lacks the attributes of the sovereign could result in unrestricted immunity. Requ[illegible]an entity, whether a private party or a statutorily designated federal instrumentality, to function as "an arm of the Government" or "stand in the shoes of the Government" in order to qualify for the immunity, is appropriate.

Production Credit Associations are not sufficiently governmental to be afforded the umbrella of governmental immunity from state taxation. The Federal government does not own any capital stock in any of the institutions of the Farm Credit System, including PCAs. It does not appoint any members to the boards of directors of PCAs. It does not appropriate any funds to PCAs, nor does it guarantee any of their debt. See 62 Fed.

[34] The language of 12 U.S.C. §§ 931-933 providing that Federal land banks, "including the capital and reserve or surplus therein and the income therefrom" are exempt from state taxation does not limit the exemption to allow a state to impose a sales tax on the bank's purchaser. See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941).

[35] 12 U.S.C. § 548 allows state taxation of national banks in any of four ways specified in the statute, as well as taxation of their real property. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 341-342 (1968).

[36] 316 U.S. at 430.

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b. The specific statutory immunity from state taxation originally conferred on PCAs by Congress was specifically waived when they became privately owned.

From the time of their creation, Congress expressly addressed the taxation of PCAs. Currently, 12 U.S.C. § 2077 provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Upon their creation in 1933, Congress granted PCAs a broad express exemption from both Federal and state tax. The associations, their property, their franchises, capital, reserves, surplus and other funds, and their income was exempt, but not their real property. However, Congress expressly waived the exemption after the government stock was retired. See Pub.L. No. 73-98, § 63, 48 Stat. 257, 267.

The Farm Credit Act of 1971 repealed the existing farm credit legislation and rewrote the Farm Credit Act. The existing tax status of PCAs was reenacted under the PCA section of the bill (Sec. 2.17), with little change in the language of the statute other than the removal of the reference to associations other than PCAs. *See generally,* H. R. Rep. No. 593, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2091, 2111. The express exemption from taxation and the waiver of exemption from taxation was preserved. Farm Credit Act of

1971, Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971).

Decisions that occurred during the period following the retirement of all PCA stock held by the Government, while not decided under current law, are indicative of the clear statutory waiver of the exemption. *See generally, Woodland Production Credit Association v. Franchise Tax Board*, 225 CA 2d 293, 37 Cal. Rptr. 231 (1964) (statutory waiver of exemption from taxation of PCAs permits taxation of the corporation itself; thus PCA is not exempt from California franchise tax which is a tax on the income of the corporation); *Columbus Production Credit Association v. Bowers*, 173 Ohio St. 97, 180 N.E.2d 1 (1962), cert. den. 371 U.S. 826 (1962) (production credit association held not exempt from Ohio franchise tax; exemption from state taxation waived by Congress in provision that exemption will not apply after the stock in the PCA held by the governor has been retired); *Baker Production Credit Association v. State Tax Commission*, 421 P.2d 984 (Ore. 1966) (each PCA became subject to state taxation when the government ownership of its stock ended).

The Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678, 1705 (1985) amended much of the Farm Credit Act, in part to make the Farm Credit Administration an arm's-length regulator of the System and to remove the day-to-day participation in management. *See generally*, H. R. Rep. No. 425, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587. The PCA taxation statute was amended

by "striking out the last two sentences of section 2.17."[37] This amendment was included in Section 205 which "contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration," and which deletes references to the Governor of the Farm Credit Administration, which position was abolished by the amendments. H.R. Rep. No. 425, 99th Cong., 1st Sess. *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587, 2615.

The 1985 amendment removed both the express exemption and the express waiver of the exemption, leaving, with only

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[37] The sentences, immediately before the amendment striking them, read:

> Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that interest on the obligations of such association shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742 (a)) and except any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

Pub. L. 92-181, Title II, Part B, § 2.17, 85 Stat. 602.

very minor changes, the current section 2077.[38] Although currently Section 2077 exempts the notes, debentures, and obligations issued by the PCA from state taxation, it does not confer the broad immunity from state taxation construed by both the district court and the court of appeals.

For the foregoing reasons, PCAs are not exempted from state taxation by the doctrine of implied immunity of federal instrumentalities from state taxation or by 12 U.S.C. § 2077.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be vacated.

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February 28, 1997

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[38] An amendment in 1988 inserted a comma after "interest" and "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority." Pub. L. 100-399, § 401 (r), 102 Stat. 998.

APPENDIX A

APPENDIX A

Ark. Code Ann. § 26-18-507 provides:

(a) Any taxpayer who has paid any state tax to the State of Arkansas, through error of fact, computation, or mistake of law, in excess of the taxes lawfully due shall, subject to the requirements of this chapter, be refunded the overpayment of the tax determined by the director to be erroneously paid upon the filing of an amended return or a verified claim for refund.

(b) The claim shall specify:

(1) The name of the taxpayer;

(2) The time when and the period for which the tax was paid;

(3) The nature and kind of tax paid;

(4) the amount of the tax which the taxpayer claimed was erroneously paid;

(5) The grounds upon which a refund is claimed; and

(6) Any other information relative to the payment as may be prescribed by the director.

(c) The director shall determine what amount of refund, if any, is due as soon as practicable after a claim has been filed, but in no event shall the taxpayer be entitled to file a suit for refund under subsection (e) of this section until at least six (6) months have elapsed from the date of the filing of the claim for refund.

(d) Notwithstanding any provisions of the law to the contrary, a taxpayer who acts only as an agent of the state in the collection of any state tax shall be entitled to claim a credit or refund of such tax only if the taxpayer establishes that he has:

(1) Borne the tax in question;

(2) Repaid the amount of the tax to the person from whom he collected it; or

(3) Obtained the consent of the person to the allow-

ance of the credit or refund.

(e) (1) The director shall make a written determination and give notice to the taxpayer concerning whether or not a refund is due. If a refund is due, the director shall certify that the claim is to be paid to the taxpayer as provided by law or credited against taxes due or to become due.

(2) (A) The taxpayer may seek judicial relief from

(i) The written decision of the director which denies the claim in whole or part; or

(ii) The director's failure to issue a written decision after the claim has been filed for six (6) months, by filing any action with the Pulaski County Chancery Court or the chancery court of the county in which the taxpayer resides or has his principal place of business after at least six (6) months have expired from the date of the filing of the claim for refund if the director has not acted on the claim, or within ninety (90) days after issuance of the director's written decision.

(B) A written decision of the director on a refund becomes final and not subject to suit ninety-one days after it is issued to the taxpayer.

APPENDIX B

APPENDIX B

26-18-406. Judicial relief.

(a) Within thirty (30) days of the issuance of the notice and demand or payment of a deficiency in tax established by a final determination of the hearing officer or the director under § 26-18-405, a taxpayer may seek judicial relief from the final determination by either:

(1) Paying under protest the amount of the deficiency, plus penalty and interest determined by the director to be due, and filing a suit to recover that amount within one (1) year from the date of payment under protest; or

(2)(A) Filing with the director a bond in double the amount of the tax deficiency due and by filing suit within thirty (30) days thereafter to stay the effect of the director's determination.

(B) The bond shall be subject to the condition that the taxpayer shall file suit within thirty (30) days after filing the bond, shall faithfully and diligently prosecute the suit to a final determination, and shall pay any deficiency found by the court to be due and any court cost assessed against him.

(C) A taxpayer's failure to file suit, diligently prosecute the suit, or pay any tax deficiency and court costs, as required by this subsection, shall result in the forfeiture of the bond in the amount of the assessment and assessed court costs.

(b)(1) Jurisdiction for a suit to contest a determination of the director shall be in the Pulaski County Chancery Court or the chancery court of the county in which the taxpayer resides or has his principal place of business, where the matter shall be tried de novo.

(2) An appeal will lie from the chancery court to the Supreme Court of Arkansas, as in other cases provided by law.

(c)(l) All taxes and penalties paid under protest shall be held by the director in a "Tax Protest Fund Account."

(2) The director shall make refunds of the taxes and penalties found by the court to be overpaid by the taxpayer from the Tax Protest Fund Account.

(3) If no suit is instituted by a taxpayer within one (1) year of the date of payment, the director shall pay the amount so held into the appropriate account as provided in § 26-18-308.

(d) The method provided in this section is the exclusive method for seeking relief from a written decision of the director establishing a deficiency in tax. No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under any state tax law.

(e)(1) In any court proceeding under this section, the prevailing party may be awarded a judgment for court costs.

(2) A judgment of court costs entered by the court in favor of either party shall be treated, for purposes of this chapter, in the same manner as an overpayment or deficiency of tax, except that no interest or penalty shall be allowed or assessed with respect to any judgment for court costs.

(12)

No. 95-1738

In The

Supreme Court of the United States

October Term, 1996

STATE OF ARKANSAS,

Petitioner,

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; AND DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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12 U.S.C. 2001(a).

It is well declared to the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

The following facts are submitted to supplement the Statements of the Case provided by Arkansas and the United States, as amicus in support of Arkansas.

Production Credit Associations are member institutions of the Farm Credit System; they may lend only to farmers and certain businesses which furnish farmers with services directly related to their on-farm operating needs. 12 U.S.C. 2075(a). In setting rates and charges, the Associations' objective is to provide credit "at the lowest reasonable cost on a sound business basis." 12 U.S.C. 2075(c)(2).

Because the Farm Credit System lends solely to the agricultural sector, the agricultural depression of the 1980's placed the System under severe financial stress. H.R. Rep. 425, 99th Cong., 1st Sess. 6-7 (1985). In the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985), Congress gave the Treasury discretionary authority to provide financial aid to the System through the mechanism of the Federal Farm Credit System Capital Corporation. H.R. Rep. 425, *supra*, 28-29.

Continuing deterioration in the System's finances resulted in the enactment of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988). This Act committed up to $4,000,000,000 to support the System. Pub. L. No. 100-233, § 201, 101 Stat. 1597 (12 U.S.C. 2278b-6). Congress explained that this new federal assistance was required because other major agricultural lenders, life insurance companies and commercial banks, had either suspended or significantly cut back on their agricultural lending. S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987). Ultimately, $1,261,000,000 was provided to various Farm Credit System institutions through the Farm

Credit System Financial Assistance Corporation and Assistance Board which replaced the Farm Credit System Capital Corporation. 12 U.S.C. 2278a; *see* Federal Farm Credit Banks Funding Corporation, Annual Information Statement – 1990, at 4. The Financial Assistance Corporation issued bonds backed by the U.S. Treasury, the proceeds of which were used to purchase a special class of "Assistance Preferred Stock" in financially distressed Banks and Associations. 12 U.S.C. 2278b-7. The Farm Credit System Assistance Board certified institutions eligible to receive an equity infusion from the Financial Assistance Corporation. 12 U.S.C. 2278a-4. No financial assistance was received by the Associations which are parties to this suit.

SUMMARY OF ARGUMENT

Congress designed the Farm Credit System to provide for the unique credit needs of America's farmers. It is a federally sponsored, federally supported, farmer-owned cooperative system which assists farmers in obtaining adequate and reliable credit at the lowest possible cost. 12 U.S.C. 2001(a). This is its sole function. Neither the Federal government, through direct lending, nor the private banking system can reliably perform this function. H.R. Rep. No. 171, 73d Cong., 1st Sess. 1-2 (1933) and S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987). In recognition of their governmental function, Congress has specifically designated the Production Credit Associations, and the other institutions of the Farm Credit System, as "Federally chartered instrumentalities of the United States." 12 U.S.C. 2071(a), 2071(b)(7) and 2077.

The Production Credit Associations have the mission of providing farmers with operational funding "at the lowest reasonable cost on a sound business basis." 12 U.S.C. 2075(c)(2). They are not operated for the profit of shareholders. The earnings of the Associations are returned to their member-borrowers as a means of reducing their borrowing costs. *Federal Land Bank of Wichita v. Board of County Comm'rs*, 368 U.S. 146, 151-152 (1961).

In the 1980's the agricultural sector entered into a severe depression. Because the Farm Credit System is, by Law, limited to lending to agriculture, the System incurred enormous losses, $4,600,000,000 in 1985 and 1986 alone. These losses substantially depleted the Farm Credit System's capital base and raised questions about its continued viability. H.R. Rep. No. 425, 99th Cong., 1st Sess. 6-7 (1985).

In response, Congress enacted a series of laws culminating in the authorization of up to $4,000,000,000 of new federal investment in the System. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1568, 1597 (1988) (12 U.S.C. 2278b-6). Congress authorized this investment because private creditors had again essentially withdrawn from lending to agriculture, and only the Farm Credit System could be relied upon to provide necessary credit in times of financial stress. S. Rep. No. 230, *supra*, at 14. In performing this function, the Farm Credit System acts as a fiscal arm of the federal government.

The Tax Injunction Act, 28 U.S.C. 1341, denies the district courts jurisdiction to enjoin the assessment or collection of state taxes. 28 U.S.C. 1341 does not restrict suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions.

Department of Employment v. United States, 385 U.S. 355 (1967).

The lower federal courts have understood *Department of Employment* to permit Federal instrumentalities, under certain circumstances, to sue on their own behalf in federal court to enjoin the imposition of unconstitutional state taxes. *See, e.g. Federal Reserve Bank of Boston v. Commissioner of Corps. & Taxation*, 499 F.2d 60 (1st Cir. 1974). These cases generally undertake an analysis:

> [i]n which each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.

Federal Reserve Bank, 499 F.2d at 64. If the instrumentality is asserting a sovereign governmental interest, Federal court jurisdiction is appropriate.

The United States, as an amicus in support of Arkansas, has endorsed this test in the present case. Brief for the United States as Amicus Curiae Supporting Petitioner, at 20 [hereinafter *Brief for the United States*]. The Production Credit Associations concur. The Production Credit Associations, and the other members of the Farm Credit System, may rightly claim a sufficient sovereign interest to permit them to sue on their own behalf.

Production Credit Associations are repeatedly designated by Congress as "Federally chartered instrumentalities of the United States"; the Associations perform a governmental role which Congress deems essential; Congress has repeatedly provided funding to the System in times of stress and implicitly guarantees Farm Credit System debt; and the federal government exercises pervasive

regulatory authority over the System. 12 C.F.R. § 600.1, *et seq*. Consequently, the Production Credit Association should be permitted to maintain this action.

The Court should not adopt a rule that the United States must be a party in all cases in which instrumentalities seek to challenge unconstitutional state taxes. The decision by the United States to participate in a particular suit will necessarily be influenced by the view of the Justice Department, an agency of the Executive Branch, regarding the merits of the instrumentality's claim. If the United States refuses to join the instrumentality in invoking federal court jurisdiction, state courts may infer that the instrumentality does not perform an essential governmental role, or that the United States is not persuaded of the instrumentality's claim of tax exemption.

The importance of the Federal instrumentality's federal function and the merits of its immunity claim are issues for Congress and the courts. To the extent the United States wishes to participate in deciding these questions, it should do so, not as a gatekeeper which can bar Federal instrumentalities from suing in federal court, but as an amicus providing the Executive Branch's unique perspective on these questions.

When Congress created the Production Credit Associations, it enacted a conditional waiver of state tax immunity under which the Production Credit Associations would lose their immunity when all federal investment was retired. Farm Credit Act of 1933, ch. 99, § 63, 48 Stat. 257, 267 (1933). In 1985, Congress repealed this conditional waiver. Farm Credit Amendments Act of 1985, Pub. L. 99-205, § 205, 99 Stat. 1678, 1705 (1985).

Under the rule of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a Federal instrumentality is immune from state tax unless Congress has expressly waived that immunity. The current statute, and particularly 12 U.S.C. 2077, does not waive the Associations' immunity, expressly or otherwise. The various canons of statutory construction offered by Arkansas and its amici do not support a contrary conclusion. Congress authorized new federal investment in the Farm Credit System in 1985. In light of this renewed investment, to be made through a centralized mechanism rather than directly in the Associations, it is reasonable to conclude that Congress intended to repeal the prior conditional waiver of state tax immunity.

ARGUMENT

The district court's jurisdiction to hear this case, and the Production Credit Associations' immunity from state taxation, both derive from the fact that the Associations perform an essential governmental function – providing needed credit to American farmers. The first section of this brief reviews the development of the Farm Credit System, the governmental function Congress designed the System to perform, and prior judicial recognition of this governmental role. The remaining sections of the brief consider the jurisdiction and tax immunity issues presented in this case in light of the governmental role played by the Associations and the Farm Credit System.

I. THE PRODUCTION CREDIT ASSOCIATIONS WERE SPECIFICALLY CREATED BY CONGRESS TO PERFORM THE IMPORTANT GOVERNMENTAL FUNCTION OF PROVIDING CREDIT TO FARMERS

Section 1 of the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), as amended (12 U.S.C. 2001 *et seq.*), states:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

12 U.S.C. 2001(a). The institutions of the Farm Credit System have been designed to satisfy the unique credit needs, and certain closely related services, of farmers. This is their only function. *See, e.g.*, 12 U.S.C. 2075(a) (production credit associations authorized to provide short and intermediate-term loans to their farmer members).

In recognition of their role in fulfilling the policies and objectives of Congress, Production Credit Associations are expressly designated:

> Federally chartered instrumentalities of the United States.

12 U.S.C. 2071(a), 2071(b)(7), and 2077. The member institutions of the Farm Credit System are unique in being statutorily designated "Federal instrumentalities." This designation has not been given to any other entity created by Congress.

A. The Farm Credit System Consists of Federally Sponsored and Supported, Farmer-Owned, Cooperative Institutions Created to Satisfy the Unique Credit Needs of Agricultural Borrowers

The first step in the creation of the modern Farm Credit System was the formation of the Federal Land Banks, pursuant to the Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916). The Senate Committee Report explained the need for institutions specifically created to provide farmers with mortgage loans. It was first concluded that commercial banks could not fulfill this role:

> National banks were encouraged to make personal loans to farmers for periods of six months, and were to a limited extent permitted to loan on improved farm lands for periods not exceeding five years; but your committee is convinced that loans must be made available to farmers on long-term mortgage security through some medium other than the commercial bank.

S. Rep. No. 144, 64th Cong., 1st Sess. 2-3 (1916). Congress also determined that time and savings deposits were not realistically available to fund farm mortgages, but that funds for long-term investment were available from other private sources. *Id.* at 3.

What was needed was a federal mechanism to connect long-term investors with the farmers. The Senate Report states:

> Of money seeking long-term investment at low rates there is an abundant supply. It includes the ordinary savings of the school-teacher, clerk, minister, and wage earner; the proceeds of life insurance in the hands of widows and other beneficiaries; funds belonging to estates, minors, and wards in chancery in the hands of executors, guardians, and trustees; funds of insurance companies, benevolent orders, and societies of various kinds; endowments of colleges, hospitals, museums, and other institutions; and assets to be invested by receivers, courts, and governments.
>
> * * *
>
> Here we discover the funds that should be made available to the farmer on long-term mortgage. We may picture the owners of this vast wealth grouped on one side of a river, the farmers desiring loans grouped on the other side. It is evident that each has what the other wants. We are asked to furnish the bridge which shall bring them in touch, or rather to grant a franchise to those who will build the bridge if we will construct the approaches. *Such we conceive to be a proper function of the Government.*

Id. (emphasis added). The Federal Land Banks thus created were federally sponsored, federally supported, farmer-owned cooperatives authorized to issue long-term bonds to obtain funds to make long-term loans to their farmer-members. The mortgages would in turn secure the

bonds. By securing the bonds by a pool of farm mortgages, long-term funds could be made available to farmers at the lowest possible cost. *Id.* at 4-5.

To further lower the cost of funds, Congress also designated the bonds issued by the Federal Land Banks as "Federal instrumentalities." While not constituting a statutory guarantee of payment by the federal government, this designation gives the bonds an implicit guarantee of federal support which permits the bonds to be issued at a "preferred" rate. Congress explained:

> System entities are not Government owned or controlled, however the System is a "Government sponsored entity" that affords it a preferred place in the Nation's money markets. System debt issuances however are not guaranteed by the Federal Government.

H.R. Rep. No. 295, 100th Cong. 1st Sess. 55 (1987).[1]

In 1933, Congress addressed the agricultural sector's need for shorter term operational financing. Congress concluded that this financing could not be provided by the federal government or by private lending institutions and again turned to the federally sponsored and supported, farmer-owned cooperative model to provide operational financing. The result was the creation of the Production Credit Associations, pursuant to the Farm Credit Act of 1933, ch. 98, § 20, 48 Stat. 257, 259 (1933).

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[1] System banks currently issue notes and bonds on a consolidated basis with each bank jointly and severally liable for the obligations. They are still issued at a "preferred" rate. H.R. Rep. 295, *supra*, at 55.

Congress explained the need for the Production Credit Associations:

> The bill is designed to supply credit for agricultural production and marketing. It is supplementary to the land mortgage credit system provided for in the Federal Farm Loan Act.
>
> While direct lending by the Government to farmers to finance their production may be justified in cases of emergency, it is an unsatisfactory system of providing the required credit, for it is too expensive, it cannot be sufficiently flexible to meet local needs, and for other reasons is not a satisfactory method of furnishing essential credit. The other policy of permitting such lending to be done entirely by private agencies has been equally unsuccessful. Banks and other credit institutions in many instances have been either unable or unwilling to finance production and particularly in times of economic stress, many farmers in many localities have no possibility of obtaining loans for agricultural production. Such institutions as have been financing agricultural production have charged rates of interest which frequently make the farmer a perpetual debtor of his financing agency.
>
> The policy of this bill is to provide the stimulus in the form of Government capital and supervision to the establishment of local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost.

H.R. Rep. No. 171, 73d Cong., 1st Sess. 1-2 (1933).[2] With the creation of the Production Credit Associations (and the Banks for Cooperatives to provide financing to agricultural cooperatives), the modern Farm Credit System was essentially complete.

One of Arkansas's amici describes the Production Credit Associations as "depression era" entities which are now simply private, profitable financing institutions. *Brief for Amici States of Ohio, et al.*, at 11. The description of the Associations as private, profitable financing institutions is wrong, but the reference to the Associations as "depression era" entities is more revealing than amicus recognizes.

After World War II, American agriculture and the institutions of the Farm Credit System enjoyed a long period of prosperity. As a consequence, the Production Credit Associations were able to retire all government capital by 1968. H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971). The 1980's were a different story.

Beginning in the early 1980's the agricultural sector entered a severe depression. Congress described the situation:

> The Nation's agriculture economy is in a depression. American farmers and ranchers today must cope with problems as severe as any their

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[2] The Associations originally discounted the operating loans to their members with the then existing Federal Intermediate Credit Banks ("FICB's"). H.R. Rep. No. 171, *supra*, at 4. In 1988, the FICB's were merged with the Federal Land Banks to form the present Farm Credit Banks. *See* 12 U.S.C. 2011.

> industry has faced since the 1930's. Low commodity prices, high interest rates, expensive production costs, instability in the export market, and plummeting farmland values have made it impossible for tens of thousands of farm operators to service their debt loads.
>
> * * *
>
> It comes as no surprise, therefore, that agriculture-related businesses have become victims of the depression in Rural America in much the same way farm families have. Not the least of those related industries affected by the suffering rural economy is the agricultural lending sector. Because the banks and associations of the Farm Credit System are, by Law, single industry lenders to U.S. agriculture, it stands to reason that the System is under tremendous financial stress.

H.R. Rep. No. 425, 99th Cong., 1st Sess. 6-7 (1985). The Farm Credit System's initial response to the farm crisis was the implementation of various cooperative loss-sharing agreements and System assistance packages which made the resources of the entire System available to support the hardest hit Banks and Associations. *Id.* at 13. However, by 1985, these self-help programs had proven inadequate. *Id.*

Beginning in 1985, Congress enacted a series of legislative programs to reorganize and provide federal financial support to the Farm Credit System. The major enactments were the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985); The Farm Credit Act Amendments of 1986, Pub. L. 99-509, 100 Stat.

1877 (1986); and the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988).

The Farm Credit Amendments Act of 1985 had four primary goals: to provide statutory authority to make the System's entire resources available to shore up weakened Banks and Associations; to strengthen the Farm Credit Administration's regulatory authority and make it more of an independent regulator; to give discretionary authority to the Treasury to provide financial aid to the System; and to provide additional statutory protection to borrowers. H.R. Rep. No. 295, *supra*, at 55-56. This last goal was accomplished by authorizing comprehensive rules regulating the relationship between System institutions and their member-borrowers, particularly in the case of distressed loans and foreclosures. H.R. Rep. No. 425, *supra*, at 11-12.[3]

[3] Pursuant to the Farm Credit Act, the Farm Credit Administration has issued regulations on virtually every aspect of a Production Credit Association's business, including formation (12 C.F.R. § 611.1000), minimum loan-to-capital ratios (12 C.F.R. § 615.5200), territorial limitations (12 C.F.R. § 614.4070), accounting for troubled loans (12 C.F.R. § 621), the terms and conditions of loans (12 C.F.R. § 614.4200), the setting of interest rates (12 C.F.R. § 614.4270), lending limits (12 C.F.R. § 614.4351), borrower eligibility (12 C.F.R. § 613.3020) and termination or dissolution (12 C.F.R. § 611.1200-1270).

The pervasiveness of the regulatory regime is most striking in a Production Credit Association's dealings with distressed borrowers. *See* 12 U.S.C. 2199-2202e. For example, the Farm Credit Act prescribes several procedural prerequisites to a foreclosure action (12 U.S.C. 2202a) and provides an appeals process whereby a borrower can petition a credit review committee, consisting of fellow farmer-members, to review denials of restructuring applications (12 U.S.C. 2202). The special rights and privileges afforded distressed borrowers are in furtherance of the Congressionally mandated mission of the Production Credit Associations. *See* S. Rep. No. 230, *supra*, at 33-35 (describing how borrower rights provisions benefit the "family farmer").

Continuing deterioration in the Farm Credit System's finances resulted in the enactment of the Agricultural Credit Act of 1987.[4] This Act committed up to $4,000,000,000 of Treasury funds to support the System. Pub. L. No. 100-233, § 201, 101 Stat. 1597 (12 U.S.C. 2278b-6). Congress explained the need for federal support:

> Life insurance companies and commercial banks have also experienced [agricultural loan] losses comparable in percentage terms to those of the FCS but the diversified nature of their total loan portfolio limits the effect of these losses on their earnings and net worth. In response to these losses virtually all life insurance companies have suspended their farm loan programs. Similarly many commercial banks are unwilling to take on new customers and farm loan losses have resulted in a significant number of bank failures among small agricultural banks. *This contraction in the number of institutions willing to supply credit to farmers makes it even more important that the FCS remain a viable source of credit to agriculture during good times and bad.*

[4] The Farm Credit System institutions reported a total loss of ($4,600,000,000) in 1985 and 1986. H.R. Rep. No. 295, *supra*, at 57. This represented approximately forty percent (40%) of the total capital which the System had accumulated in the prior 70 years. *Id.*

S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987) (emphasis added).[5]

The agricultural depression of the 1980's is only the most recent demonstration of the recurring inability, or unwillingness, of private lenders to provide essential farm credit during hard times. It explains Congress's reaffirmation of the governmental function performed by the Farm Credit System – the provision of credit to agriculture in "good times and bad."

This Court has repeatedly recognized the essential role of the Farm Credit System in providing credit to the agricultural sector. In *Federal Land Bank of Columbia v. Gaines*, 290 U.S. 247 (1933), the Court stated:

> The Federal Farm Loan Act was adopted in response to a national demand that the federal government should set up a rural credit system by which credit, not adequately provided by commercial banks, should be extended to those engaged in agriculture, upon the security of farm mortgages.

290 U.S. at 250. In *Federal Land Bank of St. Louis v. Priddy*, 295 U.S. 229 (1935), the Court stated:

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[5] Congress also provided cash payments under federal farm programs to assist the System's farmer-members in servicing their debt. The 1988 Annual Information Statement of the Farm Credit System states:

> Cash payments under U.S. Government farm programs played a major role in the increased ability of borrowers to continue in operation and to service their debts.

Federal Farm Credit Banks Funding Corporation, Annual Information Statement – 1988, at 6.

> Without now entering into a detailed examination of the subject, it is sufficient that this Court has already had occasion to consider the organization and functions of federal land banks, and to declare that they are instrumentalities of the federal government, engaged in the performance of an important governmental function.

295 U.S. at 231. *Accord, Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941), and *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 395 n.4 (1983) (describing the Farm Credit banks as "Federal instrumentalities designed to provide a reliable source of credit for agriculture").

This Court has not had occasion to consider the Federal instrumentality status of Production Credit Associations. The lower federal courts have concluded that the Associations are Federal instrumentalities. *See In re Sparkman*, 703 F.2d 1097 (9th Cir. 1983) (Production Credit Associations are Federal instrumentalities which partake of federal sovereignty and are thus immune from punitive damages). Decisions of the Eighth and Eleventh Circuit Courts of Appeal are in accord. *Schlake v. Beatrice Prod. Credit Ass'n*, 596 F.2d 278 (8th Cir. 1979); *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985).

B. Farm Credit System Institutions are Not Profit-Making Organizations

Despite the consistent recognition and reaffirmation by Congress, this Court, and the lower Federal courts of

the unique governmental function performed by the institutions of the Farm Credit System, Arkansas and its amici allege that a Production Credit Association is:

> a federally chartered, privately owned entity that performs no governmental or regulatory function and exists to make profits for its members.

Brief for the United States, at 11. Arkansas and its amici err, both in refusing to admit the governmental role of Production Credit Associations, and in claiming that the members of the Farm Credit System exist to make profits for their members.[6]

By statute and regulation, Production Credit Associations operate in accordance with cooperative principles. 12 U.S.C. 2074; 12 U.S.C. 2154a(c)(1)(E); 12 C.F.R. § 615.5230. In setting rates and charges, they are obligated to provide credit

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[6] Similar claims regarding the Federal Land Banks were rejected in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102-03 (1941). The same claims were made regarding the Second Bank of the United States, and rejected by Chief Justice Marshall in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 871 (1824). The Second Bank of the United States was, unlike the Production Credit Associations, operated for the profit of its private shareholders. *See Osborn*, 22 U.S. at 859-60, and *First Agricultural Nat'l Bank of Berkshire v. State Tax Comm'n*, 392 U.S. 339, 355 (1968) (dissenting opinion). Nonetheless, Chief Justice Marshall concluded:

> The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes.

Osborn, 22 U.S. at 860

"at the lowest reasonable cost on a sound business basis." 12 U.S.C. 2075(c)(2).

A member borrower must purchase stock in the Production Credit Association as a condition of obtaining a loan. *See* 12 U.S.C. 2154a(c)(1)(E). When a Production Credit Association distributes earnings to its members, 12 U.S.C. 2074, the purpose is not to distribute a profit on the farmers' mandatory capital investment. The purpose is to reduce the farmers' borrowing cost. The Court explained in *Federal Land Bank of Wichita v. Board of County Comm'rs*, 368 U.S. 146 (1961):

> The purpose of the Federal Farm Loan Act and its subsequent amendments was to provide loans for agricultural purposes at the lowest possible interest rates. One method of keeping the interest rate low was to authorize the federal land bank to make a profit to be distributed to the shareholders in the form of dividends. Because the associations of farmer-borrowers were required by law to be shareholders, the distribution of dividends effectively reduced the interest rates.

368 U.S. at 151-152. The distribution of earnings to reduce farmer-members' effective borrowing costs has been a part of the design of the Farm Credit System since the enactment of the Federal Farm Loan Act in 1916. *See* S. Rep. No. 144, *supra*, at 4-6; H.R. Rep. No. 643, 64th Cong., 1st Sess. 10 (1916).

In sum, the member institutions of the Farm Credit System are cooperative associations created to perform a single governmental function – the extension of affordable, secure and reliable credit to agricultural borrowers.

Congress has repeatedly recognized that this is a function which cannot be successfully performed directly by the federal government. It is a function which private lenders have either not been able, or willing, to perform. The function delegated to the Farm Credit System is, as declared by Congress in 1916: "a proper function of the Government." S. Rep. No. 144, *supra*, at 3.

II. THE TAX INJUNCTION ACT DOES NOT BAR THIS SUIT BECAUSE THE ASSOCIATIONS ACT AS A FISCAL ARM OF THE GOVERNMENT

28 U.S.C. 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Despite the apparently absolute language of this jurisdictional bar, this Court held in *Department of Employment v. United States*, 385 U.S. 355 (1966):

> in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions.

385 U.S. at 358 (citations collected). The authorities cited by the Court explained that the primary purpose of the Tax Injunction Act was to prohibit multistate corporations from suing in federal court under diversity jurisdiction to enjoin state taxes. *See* S. Rep. No. 1035, 75th Cong., 1st

Sess. 2 (1937). These decisions also applied the established rule that a statute denying prior rights does not apply to the sovereign, unless explicitly stated. *See United States v. United Mine Workers*, 330 U.S. 258, 272 (1947). *See Brief for the United States*, at 14-15.

The lower Federal courts have interpreted *Department of Employment* to authorize Federal instrumentalities, under certain circumstances, to sue on their own behalf in federal court to enjoin the imposition of unconstitutional state taxes. *See Federal Reserve Bank of Boston v. Commissioner of Corps. & Taxation*, 499 F.2d 60 (1st Cir. 1974) (Federal Reserve Bank could sue in the absence of United States as co-plaintiff); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991) (same for FDIC); *Simon v. Cebrick*, 53 F.3d 17 (3rd Cir. 1995) (same for FDIC). *Compare United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973) (Federal Savings and Loan Associations could not join suit to raise state law questions); *Federal Deposit Ins. Corp. v. State of New York*, 928 F.2d 56 (2d Cir. 1991) (FDIC could not bring suit on behalf of insolvent banks); and *Housing Auth. of Seattle v. Washington*, 629 F.2d 1307 (9th Cir. 1980) (local Housing Authorities could not bring suit in absence of United States). The issue in this case is whether Production Credit Associations perform a sufficiently important governmental role to permit them to bring suit in federal court to enjoin state taxes without the participation of the United States.

Initially, it seems surprising that Federal instrumentalities, whose constitutional exemption derives from the need to protect their governmental activities from state taxation, would be required by Congress to utilize the state courts to vindicate such federal rights, though,

of course, with an ultimate appeal to this Court.[7] This result seems particularly inappropriate in cases such as this which do not involve any questions of state law.

Arkansas and its amici admit that nothing in the legislative history of the Tax Injunction Act suggests any intention to deny Federal instrumentalities access to the federal courts. *Brief for Petitioner*, at 12; *Brief for the United States*, at 14. In *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall responded skeptically to the claim that the federal courts should not have jurisdiction to protect the immunity of the Second Bank of the United States from state taxation:

> The question, then, is whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

22 U.S. at 849. Chief Justice Marshall concluded that the federal courts were available to vindicate the Bank's immunity from state taxation. As a matter of policy, the same conclusion is appropriate here.

More recently, the Fifth Circuit Court of Appeals arrived at a similar conclusion regarding access to the federal courts in *Federal Deposit Ins. Corp. v. City of New*

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[7] Certainly, the state courts can be expected to perform this function properly, and the Associations concede that Arkansas does provide a "plain, speedy and efficient" remedy to the resolution of tax disputes.

Iberia. Affirming the district court's holding that 12 U.S.C. 1341 was inapplicable to the FDIC's suit, the court stated:

> Section 1341 deprives federal courts of jurisdiction to enjoin, suspend or restrain the assessment, levy or collection of any tax under state law except where no plain, speedy and efficient remedy is available in state courts. While the goal of the statute is to reinforce federalism and comity with the states in matters of local taxation, that goal is not subserved when the local authorities have attempted to tax an instrumentality of the federal government.

New Iberia, 921 F.2d at 613.

It is also revealing that *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), a landmark of modern "Federal instrumentality" doctrine, was brought in federal court. The Tax Injunction Act was adopted in the same year in which this Court rendered its decision. While the statute might not have been applicable to that specific litigation, it is surprising that the Court did not even comment on the restriction on federal jurisdiction.[8]

The position of the United States in this case is also surprising. In *United States v. Michigan*, 851 F.2d 803 (6th

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[8] One amicus claims that national banks have been denied the right to sue in federal court to enjoin state taxes under principles comparable to the Tax Injunction Act. *Brief for Amici States of Ohio, et al.*, at 12 (citing *Hammerstrom v. Toy Nat'l Bank of Sioux City*, 81 F.2d 628 (8th Cir.)), *cert. denied*, 299 U.S. 546 (1936). Amicus misreads *Hammerstrom*. The court held only that the banks were required to exhaust their state administrative remedies to obtain the requested refunds. The court specifically did not decide whether the banks could then sue in federal court. *Hammerstrom*, 81 F.2d at 636.

Cir. 1988), the United States invoked federal court jurisdiction on behalf of the Federal Credit Unions to contest unconstitutional state taxes. The United States drew an analogy between Federal Credit Unions and the institutions of the Farm Credit System to argue that the Federal Credit Unions were performing an important governmental function. *Id.* at 806.[9]

Given this history, and the repeated congressional and judicial recognition of the governmental role of the Farm Credit System, it is difficult to avoid the suspicion that the claim in this case that the interests of the United States are not sufficiently involved to justify Federal court jurisdiction is based primarily on the Justice Department's view on the merits that Congress has

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[9] The Sixth Circuit Court of Appeals agreed:

> In *Federal Land Bank v. Bismarck Lumber Co.*, the Supreme Court held that a virtually-identical fiscal function was indicative of a tax-immune instrumentality status. The Court concluded that federal land banks were " 'instrumentalities, engaged in the performance of an important governmental function,' " 314 U.S. at 102, 62 S. Ct. at 5 (quoting *Federal Land Bank v. Priddy*, 295 U.S. 229, 231, 55 S. Ct. 705, 706, 79 L.Ed. 1408 (1935)), because "[t]hrough the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. at 102, 62 S. Ct. at 5. Thus, federal credit unions, which provide a similar public service to a broader cross-section of the nation's citizens, also perform an important governmental function.

Michigan, 851 F.2d at 806.

waived the Associations' constitutional immunity.[10] It is difficult to believe that the Justice Department would not join the Associations to invoke the aid of the federal courts if it agreed that the Production Credit Associations are immune from state tax.

A. The Production Credit Associations Satisfy the Test Proffered by the United States for Invoking Federal Court Jurisdiction

In its brief to this Court at the Petition stage, the United States offered alternative tests for determining when a Federal instrumentality may invoke the "Federal instrumentality" exception to the Tax Injunction Act. *See Brief for the United States as Amicus Curiae* at 11-13. One test was whether the United States was a party to the suit. The other was whether the Federal instrumentality performed a function sufficiently governmental to dispense with the requirement that the United States be joined as a party.

In its brief on the merits, the United States now suggests that the Court need not decide whether the United States must be a party. *Brief for the United States*, at 20. Rather, the United States suggests that the Court should undertake an analysis in which each instrumentality must be examined in light of its governmental role to determine whether it can claim any sovereign

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[10] Congress is certainly not disinterested in the work of the Farm Credit System, given that the System has been periodically supported by large capital infusions, by the implicit federal guarantee of System debt, and indirectly through farm programs which provide funds to permit farmers to service their loans.

governmental interest. *Id.* at 18-20. The Production Credit Associations willingly endorse the use of this test. They are sufficiently part of the sovereign to sue on their own behalf.

First, Congress has expressly and repeatedly acknowledged the status of the Associations as Federal instrumentalities. 12 U.S.C. 2071(a), 2071(b)(7) and 2077. Second, the Farm Credit System performs a role which Congress deems essential, 12 U.S.C. 2001(a), a role which Congress has determined that the federal government cannot effectively perform directly, and a role which cannot be reliably performed by private lenders. *See* S. Rep. No. 230, *supra*, at 14.[11] Third, Congress has repeatedly provided funding needed to maintain the System in times of stress and has implicitly guaranteed its debt. *See, supra*, p. 15. Fourth, the federal government exercises pervasive regulatory authority over the System, to a degree that detailed requirements have been imposed on dealings with member borrowers, from loan approval to foreclosure. *See supra*, p. 14, n. 3. These factors fully justify the conclusion that the Farm Credit System institutions perform a critical governmental role and are sufficiently integrated into the federal government to be entitled to

[11] The Farm Credit System is the largest source of credit to American agriculture. H.R. Rep. No. 425, *supra*, at 7. The provision of affordable, secure and reliable credit to almost 1,000,000 farmer members, H.R. Rep. No. 425, *supra*, at 6-7, is at least as important a fiscal function as that performed by the Federal Reserve Banks. Like the Federal Reserve Banks, the Farm Credit System acts as a fiscal agent of the federal government.

invoke federal court jurisdiction to protect their constitutional immunity from state taxation.[12]

In the end, the United States and Arkansas refuse to recognize the governmental role played by the Farm Credit System because they view the System as performing a "proprietary" rather than a governmental function. This is a false distinction. In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the Court stated:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which

[12] The Associations admit that one factor which may support the conclusion that a particular Federal instrumentality may sue in federal court, without joinder of the United States, is the existence of a general statutory grant of federal jurisdiction for cases involving the instrumentality. *See, e.g. Federal Reserve Bank of Boston v. Commissioner of Corps. & Taxation*, 499 F.2d at 63. However, this does not appear to be viewed by the lower federal courts as a critical consideration. This Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), is not to the contrary. While the Court found that the action in that case was not barred by the Tax Injunction Act because of 28 U.S.C. 1362, the Court distinguished cases involving taxation of Indian tribes from cases involving taxation of Federal instrumentalities. *Id.* at 471

> the federal government lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32; *Graves v. New York ex rel. O'Keefe, supra*, 477.

314 U.S. 102. In sum, the Farm Credit System institutions are not profit-seeking entities. They are fiscal "arms of the government" created to perform a *governmental* function.

B. The Court Should Not Require That the United States Must be Joined as a Co-Plaintiff

While the United States has suggested that the Court need not decide whether the United States must be a co-plaintiff to avoid the bar of the Tax Injunction Act, one amicus has embraced this rule. *Brief of Amicus Curiae Multistate Tax Commission in Support of Petitioner*, at 6-7. Adoption of this rule would make the Executive Branch a gatekeeper in deciding the scope of Congress's grant of waiver from state tax immunity, a task properly reserved to Congress and the courts.

Only the Justice Department can represent the United States in litigation. 28 U.S.C. 516. The Justice Department is part of the Executive branch. 28 U.S.C. 501. The decision of the Justice Department to invoke or refuse to invoke federal court jurisdiction will undoubtedly be influenced by its view of whether Congress has waived immunity.

The decision to waive the tax immunity of Federal instrumentalities is properly reserved to Congress. In *United States v. New Mexico*, 455 U.S. 720, 737-38 (1982), the Court stated:

> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. *James v. Dravo Contracting Co.*, 302 U.S., at 161, 58 S.Ct., at 221; *Carson v. Roane-Anderson Co.*, 342 U.S. 232, 234, 72 S.Ct. 257, 258, 96 L.Ed. 257 (1952). And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts v. United States*, 435 U.S. 444, 456, 98 S.Ct. 1153, 1161, 55 L.Ed.2d 403 (1978) (Plurality opinion). See *United States v. City of Detroit*, 355 U.S., at 474, 78 S.Ct., at 478.

Professor Tribe made a similar point in his article, *Intergovernment Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harvard L. Rev. 682 (1976) [hereinafter *Intergovernmental Immunity*]. Reviewing this Court's decisions on tax immunity, he concluded:

> Some federal institution must be entrusted with the responsibility of deciding when to confer immunity and narrow the states' revenue base, and when to deny immunity even to the extent of permitting states to assert coercive power over federal instrumentalities and property. The real question is whether that institution should be Congress or the executive.
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> As in eleventh amendment analysis, the issue is essentially one of reconciling competing claims of the states and the national government. Congress, because it represents both state and

national interests, is again the most suitable body to make this determination. Viewed from this perspective, the otherwise unilluminating holdings of the Supreme Court can be understood as reserving to Congress the power to adjust the competing fiscal and symbolic claims of federal autonomy and state revenue needs. Where Congress has been silent, the court's decision to make immunity turn on the legal incidence of a tax under a state's own laws avoids both the inherent danger of ad hoc executive determinations, and the serious interference of state law with federal instrumentalities. On the other hand, where Congress has spoken, full effect is given to its determination. Thus, although the Court's implicit doctrine may appear mechanistic and arbitrary, it can be seen as protecting Congress' role as mediator of the allocation of concurrent powers in the federal system, a role for which its structure and constituency eminently suit it.

Id. at 711. The decision of the United States to invoke federal court jurisdiction obviously creates no impediment to judicial consideration of a Federal instrumentality's tax immunity. The decision not to invoke such jurisdiction will, however, bar such consideration, at least by the lower federal courts. In addition, the decision by the United States not to invoke federal court jurisdiction may be seen by the state courts as evidence that the particular Federal instrumentality lacks a governmental role, or that the United States is not persuaded of the instrumentality's immunity. These are questions properly left to Congress and the courts.

The United States, through the Justice Department, is certainly entitled to participate in resolving the questions presented in cases such as this. However, this can best be done through the filing of an amicus brief, as the United States has done here, and as it has done in other cases such as *James v. Dravo Contracting Co., supra.*

III. CONGRESS HAS NOT WAIVED THE PRODUCTION CREDIT ASSOCIATIONS' IMMUNITY FROM STATE TAX

Arkansas and its amici persist in describing the substantive issue in this case as whether Congress has granted the Production Credit Associations an "exemption" from state tax. *Brief for Petitioner*, at 25; *Brief for the United States*, at 24. This formulation of the issue ignores an unbroken line of holdings by this Court, beginning with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that Federal instrumentalities are immune from state tax unless Congress has expressly waived such immunity. Cases which have stated and applied this rule include *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103 (1923); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939); and *Department of Employment v. United States*, 385 U.S. 355 (1966). These and other cases are discussed and summarized in Congressional Research Service, *The Constitution of the United States of America, Analysis and Interpretation*, (Library of Congress, 1987), as follows:

> Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress, and only in conformity

> with the restrictions it has attached to its consent.

Id. at 935. Prof. Tribe similarly states the rule:

> The supremacy clause implies, that, absent congressional consent, no state may (1) impose upon the United States or its instrumentalities an obligation to pay any tax.

Intergovernmental Immunity, supra, at 704. In short, the issue here is whether Congress has waived the Associations' tax immunity, not whether Congress has provided a statutory tax exemption.

A. 12 U.S.C. 2077 Does Not Waive The Associations' Immunity.

12 U.S.C. 2077 states:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income tax in the hands of the holder.

As the courts below correctly concluded, nothing in this provision even arguably waives the Associations' immunity from state taxation.[13]

Where the statute is unambiguous, this Court ordinarily refuses to look behind the statutory language. As the Court stated in *Burlington Northern R.R. Co. v. Oklahoma Tax Commission,* 481 U.S. 454 (1987):

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James,* 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980)). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States,* 449 U.S. 424, 430 (1981).

Id. at 461. This approach is appropriate in the present case. The understanding that Federal instrumentalities are immune from state tax absent express congressional consent has been an established principle since *McCulloch v. Maryland* and *Osborn v. Bank of United States.* This

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[13] This provision does not even deal with the immunity of the Associations. It involves the tax status of their bonds and notes. Immunity from tax for these obligations requires an express exemption because they are generally held by private parties. Absent an express exemption, the private parties would be taxable on the bonds. *See Federal Land Bank of St. Paul,* 314 U.S. at 100. By contrast, the Associations are Federal instrumentalities and constitutionally immune from tax.

understanding is properly imputed to Congress in analyzing 12 U.S.C. 2077. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

B. The 1985 Amendment to 12 U.S.C. 2077 is Consistent With an Intention to Revoke the Prior Conditional Waiver of Immunity

Section 205 of the Farm Credit Amendments Act of 1985, 99 Stat. 1703, deleted the last two sentences of 12 U.S.C. 2077. Those sentences had read as follows:

> Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

Pub. L. No. 92-181, Title II, § 2.17, 85 Stat. 602 (1971) (12 U.S.C.S. 2098 (Law. Ed. 1984)). The deleted sentences contained two separate provisions: an exemption from federal taxation as long as the federal government owned stock in the Associations; and a waiver of immunity from

state taxation which took effect when the government's stock was redeemed.[14]

The United States suggests that the last two sentences of Section 2077 were deleted because all of the government stock in Production Credit Associations had been redeemed by 1968. *Brief for the United States*, at 11-12. This ignores the fact that Congress recognized in 1985 that the federal government would shortly need to make a substantial new investment in the Farm Credit System to shore up its finances. H.R. Rep. No. 425, *supra*, at 14. Discretionary authority was given to the Treasury to make such an investment in 1985. *Id.* at 15. Ultimately, up to $4,000,000,000 was committed for that purpose. Pub. L. No. 100-233, § 201, 101 Stat. 1597 (12 U.S.C. 2278b-6).

Congress originally provided that the Associations' immunity from state tax would be waived only when the federal government's investment in the Associations was retired. A congressional decision to eliminate the existing waiver of immunity would certainly be consistent with the expectation of renewed federal investment in the System, including indirect investment in Associations through the Capital Corporation.

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[14] Exemption from *federal* taxation does not derive from the Constitution. It must be explicitly provided by Congress. Thus, the United States' suggestion that the Associations may claim an exemption from federal taxation as the result of the amendment to Section 2077 is incorrect. *Brief for the United States*, at 27. Similarly, the amendment did not make the Associations' property exempt from tax. Constitutional immunity has never extended to property taxes. *McCulloch*, 17 U.S. at 436.

Arkansas contends that the amendment to Section 2077 was merely a technical correction to delete a reference to the "Governor of the Farm Credit Administration", a position eliminated by the 1985 Act. *Brief of Petitioner*, at 28. Arkansas is in error.

The amendment to Section 2077 was intended to reflect the redirection of federal investment from separate investments in individual System institutions to a single investment in the Capital Corporation. Congress explained:

> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the Section 4.0 revolving fund in the Farm Credit System Capital Corporation.

H.R. Rep. 425, *supra*, at 28-29. Because new federal investment was to be made indirectly through the Capital Corporation, the prior conditional waiver of immunity based on direct Federal investment in the Production Credit Associations was no longer an appropriate means of describing Congress's intentions regarding the immunity of the Associations.[15]

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[15] In the Agricultural Credit Act of 1987, the Capital Corporation was replaced by the Farm Credit System Financial Assistance Corporation and Assistance Board. It is the Financial Assistance Corporation which funneled federal funds to individual institutions. *See* 12 U.S.C. 2278a *et seq.*

Finally, Arkansas and the amici claim that the Production Credit Associations should not be deemed immune from state tax because Congress provides explicit statutory immunity to other Farm Credit System institutions. *See Brief for the United States*, at 27-29. Arkansas and amici overlook the fact that when Congress intends to waive the immunity of System institutions, it also does so with explicit language. For example, 12 U.S.C. 2211 authorizes Farm Credit System banks to organize "service corporations." Each service corporation is a "federally chartered body corporate and an instrumentality of the United States." *Id.*

In 12 U.S.C. 2214, Congress waived the state tax immunity of service corporations, except for franchise taxes. Section 2214 states:

> That to the extent that sections 2023, 2098, and 2134 of this title may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect to franchise taxes, shall not extend to corporations organized pursuant to this part.

Congress has been explicit when it intends to waive immunity. Thus, the statutory immunity provided other System institutions cannot be viewed as evidence that Congress intended to waive the immunity of the Production Credit Associations.

Nothing in 12 U.S.C. 2077 waives the Associations' immunity. Nothing in the history of the adoption of the Farm Credit Act of 1985 is inconsistent with a congressional intention to delete the previously existing waiver of immunity. Indeed, the fact that Congress amended 12 U.S.C. 2077 at a time when it was authorizing a reinfusion

of federal investment into the System is fully consistent with an intention to delete the previously existing waiver of immunity.

CONCLUSION

This Court should conclude that the district court properly exercised jurisdiction in this case. This Court should also conclude the district court and the Court of Appeals for the Eighth Circuit properly held that the Production Credit Associations are immune from Arkansas income, sales, and use tax.

Respectfully submitted,

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(13)

No. 95-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTAPRODUCTION CREDIT ASSOCIATION

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Although created by Congress and designated "federal instrumentalities," Production Credit Associations do not possess sufficient governmental attributes to entitle them to either the United States' exemption from the bar of the Tax Injunction Act or to implied immunity from state taxation.

The function of PCAs is not synonymous with the possible governmental function performed by the Farm Credit System, as a whole.

Respondents assert that the Farm Credit System performs an important governmental role. *Brief of Respondents,* at 6, 8. Whether or not the Farm Credit System can "stand in the shoes of the Government" is not at issue here.[1] Respondents further imply that any governmental functions performed by the Farm Credit System, as a whole, may be imputed to PCAs. PCAs are not synonymous with the Farm Credit System, nor are they equivalent to the other institutions in the System.

The Farm Credit System is a government sponsored enterprise comprised of the various banks, associations, and other entities. The Farm Credit Administration promulgates regulations to implement the Farm Credit Act of 1971, as amended, and examines System institutions for compliance with the Act and with sound banking practices. The three members of the Farm Credit Administration Board are nominated by the President and confirmed by the Senate. The Farm Credit Administration issues assessments to the institutions it examines and regulates for payment of the expenses of administra-

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[1] Noticeably absent from the action begun by the PCAs, in addition to the United States, is the Farm Credit Administration, among the offices of which is that of General Counsel, whose responsibility is to interpret the Farm Credit Act. 12 CFR § 600.5.

tion. No federally appropriated funds or taxpayer funds are used to pay for regulatory oversight of System institutions. 12 CFR § 600 et seq.

The Farm Credit System includes Farm Credit Banks, the Federal land bank associations, production credit associations, and the banks for cooperatives. 12 U.S.C. § 2002. Farm Credit Banks are formed by the mergers of District Federal Intermediate Credit Banks with Federal Land Banks. 12 U.S.C. § 2011. The Farm Credit Banks are authorized to make or participate in long term loans, including rural real estate mortgage loans. 12 U.S.C. § 2015. The banks for cooperatives lend to eligible cooperative associations in the System. 12 U.S.C. § 2128.

Production Credit Associations are authorized to fund short term and intermediate loans, such as crop operating expenses and equipment purchases. 12 U.S.C. § 2076. The funds for loans made by any of the Farm Credit lending entities are raised through the sale of Farm Credit bonds and notes in the national money markets. These funds are distributed to the Farm Credit Banks for lending and allocation to the PCAs and other associations to lend to their borrowers. This channeling of funds removes the PCAs yet another step from the System, making an analogy of the governmental function of the System to that of the PCAs even less applicable.

PCAs are organized and function like private corporations.

PCAs possess general corporate powers including the ability to hold property, borrow and loan money, prescribe bylaws, and be governed by a board of directors. 12 U.S.C. § 2073. As members of cooperative associations, the borrowers purchase voting stock in the association, giving them the right, as shareholders, to participate in the election of

directors and vote on issues affecting the association. 12 U.S.C. § 2072. The President exercises no authority over PCAs, comparable to the authority to appoint members to the Farm Credit Administration Board. The profits of the association inure to the benefit of the shareholder-borrowers on a patronage basis. 12 U.S.C. § 2074.

Government corporations, for purposes of the Government Corporation Control Act, include various System entities, including the Central Bank for Cooperatives, the Federal Intermediate Credit Banks, the Federal Land Banks, and the Regional Banks for Cooperatives. 31 U.S.C. § 9101. PCAs are not listed as government corporations for purposes of 31 U.S.C. § 9101.

Although PCAs are regulated by the Farm Credit Administration, this regulation is not unlike that of banks and other nongovernmental entities.

Prior to the 1985 amendments, the Farm Credit lending entities had not been subject to systematic examination. The regulatory authority provided in the 1985 amendments included regular examinations of the lending entities for the protection of the borrowers as well as the System. H.R. Rep. No. 425, 99th Cong., 1st Sess. reprinted in 1985 U.S. Code Cong. & Admin. News 2587, 2598. Government regulation of PCAs may be compared to that of any other lending institution, whether outside the Farm Credit System or within the System, which provides for examination of the entity to ensure the safety of the money market.

PCAs are not fiscal arms of the government.

None of the Farm Credit institutions receive funding from the federal government. The Farm Credit Banks and the Banks for Cooperatives obtain the majority of their loan funds through the sale of debt securities. These debt securi-

ties are not obligations of, nor are they guaranteed by, the United States or any agency or instrumentality thereof, other than the Farm Credit System banks. The last of the four Farm Credit Banks which received direct financial assistance through the Agricultural Credit Act of 1987 repaid the last of this debt in 1994. Farm Credit Administration Annual Report 1994.

Federal reserve banks have been referred to as fiscal arms of the government. *Federal Reserve Bank of Boston v. Commissioner of Corporations and Taxation*, 499 F.2d 60 (CA1 1974). Unlike PCAs, they are depositories of money held in the U.S. Treasury and, after payment of expenses and a statutory dividend on member banks' stock, return the balance of their earnings to the Treasury.

The 1985 amendment to 12 U.S.C. § 2077 did not confer upon the Production Credit Associations the broad immunity from state taxation as interpreted by the Eighth Circuit.

Respondents imply that Congress decided in 1985 to eliminate the then existing specific waiver of the PCAs' immunity from state taxation in the expectation of renewed federal investment in the System. Brief of Respondents, at 35.

What Congress actually provided in 1985 was discretionary authority to the Treasury to purchase obligations of the Farm Credit System Capital Corporation as a "safety net" for the System. This discretion would be available only if the Secretary of the Treasury determined that aid was necessary, following the System self help measures provided in the legislation. In the House Debate on H.R. 3792 on December 10, 1985, members stated that the drafters of H.R. 3792 rejected the idea of direct Federal funding of the Farm Credit System. The debate further reflected that the bill was not intended as a bailout, comparable to those for Chrysler and New York

City. 131 Cong. Rec. H. 35564, 35575-76 (December 10, 1985).

Although Respondents disagree, *Brief of Respondents* at 36, the amendment to Section 2077 was clearly provided in a section of "Technical and Conforming Amendments" in which there are approximately thirty-eight amendments which either strike out the word "Governor" entirely or strike it and replace it with the words "Farm Credit Administration." Pub.L. 92-181, Title II, Part B, § 2.17, 85 Stat. 602. Although these are not the only amendments in this section, it is apparent that the primary intent of the section is to conform the legislative language to the amendment's replacement of the "Governor" with the "Farm Credit Administration."

Had it been Congress' intent, as urged by Respondents, to restore total tax immunity to PCAs following the retirement of the Government stock in PCAs, this would have been easily achieved by striking out only the last sentence of section 2.17, which read:

> The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.

Farm Credit Act of 1971, Pub. L. No. 92-181, § 2.17, 95 Stat. 583, 602 (1971), and leaving the immediately preceding sentence providing the broad exemption from tax for the association, its property, franchises, capital, reserves, surplus and other funds and income.

By striking the waiver of the exemption and leaving the exemption, Congress could have unquestionably provided the exemption now desired by Respondents. [2]

The "plain language" of 12 U.S.C. § 2077, as amended, exempts only the obligations issued by Production Credit Associations, not the associations themselves. Presumably, at the time of the amendment Congress was aware that the Government stock in PCAs had been retired in the 1960's, at which time PCAs began paying tax. The statute, as amended, is consistent with the tax treatment of PCAs at the time of the amendment.

[2] A substantial number of other statutes provide a similar broad exemption of the entity, as well as its obligations, from taxation. Some of the entities such as Farm Credit Banks (12 U.S.C. § 2023), Federal Land Bank Associations (12 U.S.C. § 2098), the Farm Credit System Insurance Corporation (12 U.S.C. § 2277a-12), and the Farm Credit System Assistance Board (12 U.S.C. § 2278a-11) are Farm Credit entities. Many other entities have a similar broad exemption, including GNMA (12 U.S.C. § 1723a), Federal credit unions (12 U.S.C. § 1768), Federal Financing Bank (12 U.S.C. § 2290), National Consumer Cooperative Bank (12 U.S.C. § 3019) and SIPC (15 U.S.C. § 78kkk).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be vacated.

Respectfully submitted,

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FOR ARGUMENT

(8)

No. 95-1918

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether this case should have been dismissed by the district court for lack of subject-matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. 1341.

2. Whether the State of Arkansas may levy sales and income taxes upon production credit associations consistent with 12 U.S.C. 2077.

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INTEREST OF THE UNITED STATES

This case concerns the scope of federal district courts' jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341, in cases involving certain federal instrumentalities when the United States is not a co-plaintiff. If the district court correctly exercised subject-matter jurisdiction, the case also concerns whether Congress has exempted from state taxation a privately owned, for-profit agricultural lending association chartered as a federal instrumentality under the Farm Credit Act of 1971, 12 U.S.C. 2001 *et seq.*, as

amended by the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678 (1985). The United States has a substantial interest in ensuring that statutorily defined federal instrumentalities are taxed by the States solely in accordance with federal law and that the Tax Injunction Act is properly applied to federal instrumentalities. In response to this Court's invitation, the United States filed a brief at the petition stage.

STATEMENT

1. Respondents are four production credit associations chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*). Pet. App. B1. The associations are part of the United States' Farm Credit System, which was created more than 80 years ago with the passage of the Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916). Today, the Farm Credit System includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a) (App., *infra*, 1a).

Like other entities within the Farm Credit System, production credit associations are statutorily identified as instrumentalities of the United States. 12 U.S.C. 2071(a) and (b)(7) (App., *infra*, 1a-2a) (production credit associations); 12 U.S.C. 2011(a) (farm credit banks), 2091(a) and (b)(4) (federal land bank associations), 2121 (banks for cooperatives). Production credit associations are organized generally by ten or more farmers or ranchers to provide short- and intermediate-term production or operation agricultural loans. 12 U.S.C. 2071(b)(1) (App., *infra*, 1a). H.R. Rep. No. 425, 99th Cong., 1st Sess. 111 (1985). To encourage and assist those associations, the United

States (through production credit corporations) originally subscribed to some of the stock in production credit associations formed under the Farm Credit Act of 1933, ch. 98, §§ 2, 6, 48 Stat. 257, 259. See H.R. Rep. No. 425, *supra*, at 116; H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971). Over time, farmer-members of production credit associations purchased the stock owned by the United States as a precondition to obtaining credit. See H.R. Rep. No. 425, *supra*, at 116; see also Farm Credit Act of 1933, ch. 98, § 23, 48 Stat. 261. By 1968, the United States' ownership interest in previously organized associations had been completely retired, and production credit associations were owned entirely by their private borrower-members. H.R. Rep. No. 425, *supra*, at 116; H.R. Rep. No. 593, *supra*, at 8.

As of 1995, 66 chartered production credit associations operated throughout the United States. Farm Credit Admin., *1995 Annual Report on the Financial Condition and Performance of the Farm Credit System* 5 (1996) (*1995 Annual Report*). The production credit associations, together with other Farm Credit System associations that provide similar direct agricultural loans, maintained a loan portfolio of more than $13 billion in 1995. *Id.* at 18. In that year, the combined gross income of those entities from loans, investments, and other sources was more than $3 billion, and their net income was almost $600 million. *Id.* at 40.[1]

2. In the Farm Credit Act of 1933, Congress specifically exempted from all federal, state, and local

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[1] These figures include production credit associations, agricultural credit associations, and federal land credit associations. See *1995 Annual Report* 40 n.1.

taxation ("except surtaxes, estate, inheritance, and gift taxes"), the obligations of production credit associations, such as notes, debentures and bonds, "both as to principal and interest." Ch. 98, § 63, 48 Stat. 267 (App., *infra*, 3a). Congress also provided an exemption from taxation for associations in which the United States held an ownership interest. In that event, those associations were exempted from all taxation, except that their real property and their tangible personal property were subject to "Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Id.* at 4a. If and when the United States retired its stock ownership in a production credit association, however, the exemption from taxation of the association, its property, and its income was no longer effective. *Ibid.* In fact, many production credit associations had retired the United States' capital investment entirely by 1947, H.R. Rep. No. 425, *supra*, at 116, and, by 1968, were paying millions of dollars each year in federal, state, and other income taxes, see, *e.g.*, Farm Credit Admin., *34th Annual Report of the Farm Credit Administration: 1966-1967*, at 88 (1968).

When Congress amended the Farm Credit Act in 1971, all previously organized production credit associations were privately owned. H.R. Rep. No. 593, *supra*, at 8. To assist in aiding agricultural lending entities during financial emergencies, Congress empowered the Governor of the Farm Credit Administration to purchase stock in the various institutions established within the Farm Credit System, including production credit associations. Pub. L. No. 92-181, § 4.0, 85 Stat. 609. Just as it had before the 1971 amendments, therefore, Congress retained each pro-

duction credit association's stated exemption from taxation—an exemption contingent on ownership of stock in the association by the United States (now through the Farm Credit Administration instead of production credit corporations, as before). § 2.17, 85 Stat. 602 (App., *infra*, 2a-3a). The amended statute provided:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit*

associations is held by the Governor of the Farm Credit Administration.

Ibid. (emphasis added).

By 1985, a poor agricultural economy had driven the Farm Credit System into a financial crisis. See H.R. Rep. No. 425, *supra*, at 6-11. Congress enacted the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678 (1985), to permit the Farm Credit System to use its own resources in addressing the financial needs of members. See H.R. Rep. No. 425, *supra*, at 11, 14. Among other things, the 1985 Act restructured the Farm Credit Administration, modified its role within the Farm Credit System, and made it a more independent regulator. See Pub. L. No. 99-205, § 201(7), 99 Stat. 1691-1693; H.R. Rep. No. 425, *supra*, at 11-13, 28. No longer could the Farm Credit Administration own stock directly in production credit associations.[2]

In addition to changes in "the basic powers, duties and authorities of the Farm Credit Administration,"

[2] Although the Farm Credit Administration no longer was authorized to provide any separate capital assistance directly to institutions such as production credit associations, it could make investments from the United States' "revolving fund" in the newly created Farm Credit System Capital Corporation. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. The Capital Corporation became solely responsible for providing financial and technical assistance to institutions experiencing difficulties, with its funds being raised mostly internally from other institutions in the Farm Credit System. Pub. L. No. 99-205, § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. The Farm Credit System Assistance Board and the Farm Credit System Financial Assistance Corporation have since replaced the Farm Credit System Capital Corporation. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1585-1605.

the Act also contained "numerous technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28; see Pub. L. No. 99-205, § 205, 99 Stat. 1703-1707. The technical amendments deleted the two sentences within Section 2.17 of the 1971 Act italicized above that exempted a production credit association from taxation contingent upon stock ownership by the "Governor of the Farm Credit Administration." Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1705. The 1985 Act left Section 2.17, then codified at 12 U.S.C. 2098 (Supp. III 1985), much as it currently exists, now codified at 12 U.S.C. 2077 (App., *infra*, 2a).[3] The amended Section 2077 retains the 60-year-old statutory exemption from federal, state, and local taxes for "all notes, debentures, and other obligations issued by" the production credit associations, "except surtaxes, estate, inheritance, and gift taxes." The statute does not afford the associations themselves any additional exemptions from taxation, regardless of the federal government's stock holdings.

3. Respondents brought suit in the United States District Court for the Eastern District of Arkansas against the State of Arkansas, requesting both a declaratory judgment that they are exempt from state sales and income taxes and an injunction prohibiting

[3] In 1988, Congress reenacted without any change the text of Section 2098, which was redesignated as Section 2077, in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633. Congress subsequently amended Section 2077 by inserting a comma after "interest" and by adding a second exception to the tax exemption, inserting the clause "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority." Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998.

petitioner from levying such taxes upon them. Pet. App. A1. The United States neither joined the suit as a co-plaintiff nor authorized respondents' action. In their motion for summary judgment, respondents contended that they are entitled to constitutional immunity from state taxes because they are instrumentalities of the United States and because Congress has not expressly waived the immunity from taxation they enjoy as such. *Id.* at A2. Petitioner conceded that respondents are federal instrumentalities, *id.* at A3, but argued that federal instrumentality status does not *per se* entitle respondents to state and local tax immunity, and that there must be a factual inquiry into respondents' governmental nature before they may be deemed to be instrumentalities immune from state taxation, *id.* at A2. Alternatively, petitioner contended that the history of Section 2077 demonstrated that Congress had granted production credit associations only a limited exemption from taxation and, therefore, had waived respondents' constitutional immunity. See *id.* at A6.

The district court granted respondents' motion for summary judgment on the ground that respondents, as federal instrumentalities, are immune from state taxation unless Congress has expressly waived that immunity. Pet. App. B1-B3. The district court also rejected petitioner's argument that the Tax Injunction Act, 28 U.S.C. 1341, divested the court of jurisdiction over respondents' suit, citing this Court's decision in *Department of Employment* v. *United States*, 385 U.S. 355 (1966). Pet. App. B1-B2.

4. A divided court of appeals affirmed, without addressing jurisdiction in light of the Tax Injunction Act. Pet. App. A1-A12. On the merits, the court held that "states have no power to tax federally created

instrumentalities absent Congressional authorization" under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2. Pet. App. A3. The court viewed the factual extent of the United States' control or ownership of respondents as irrelevant, because production credit associations are statutorily defined federal instrumentalities performing recognized constitutional functions. *Id.* at A4-A5. The court also determined that Congress's failure to provide statutorily that production credit associations are immune from taxation does not create an implied waiver of the immunity under the Supremacy Clause. *Id.* at A6. Any waiver from the constitutional immunity must be express, and "[t]here is no provision in any statute * * * which indicates an intent on the part of Congress to waive the [production credit associations'] tax immunity as federal instrumentalities." *Ibid.*

In dissent, Judge Loken stated that it is solely Congress's province to decide which and to what extent federal instrumentalities are entitled to immunity from state taxation. Pet. App. A6-A7. After tracing the history of production credit associations, he observed that the only comprehensive tax exemption Congress had ever granted such an association had been contingent upon the United States' stock ownership in it. *Id.* at A8-A10. By 1968, however, the United States did not own stock in any production credit association. *Id.* at A10. Judge Loken emphasized the legislative history of the 1985 amendment to Section 2077 that deleted the sentences conferring the contingent tax exemption. He read that legislative history to establish Congress's intent for the amendment to create only a "technical change" that

was likely designed to remove the reference to the Governor of the Farm Credit Administration:

> Although more than the reference to the Governor was deleted, that is a logical explanation since there were *no* publicly-owned [production credit associations] in 1985 eligible to enjoy the deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption for which no [production credit association] remained eligible, as the grant of a far broader implied exemption.

Id. at A11. Judge Loken concluded that, because production credit associations were not in fact exempt from taxation before the 1985 amendment to Section 2077, they are not entitled to exemption after the amendment. *Id.* at A12.

SUMMARY OF ARGUMENT

I. The courts below erred in not dismissing this case for lack of jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341. That Act generally divests federal courts of subject-matter jurisdiction over suits to enjoin the imposition of state taxes. This Court has recognized an exception to the Act, however, for "suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). That exception does not apply to production credit associations suing by themselves without the United States as a co-plaintiff.

Under any test subsequently utilized by the courts of appeals (other than the court below in this case), a federally chartered, privately owned entity that performs no governmental or regulatory function and exists to make profits for its members cannot avoid the Tax Injunction Act unless the United States joins the suit as a co-plaintiff to protect sovereign interests. This Court need not reach the question whether *Department of Employment* extends to other federal agencies or instrumentalities suing on their own, because the production credit associations here do not assert any interest of the federal government sufficient to overcome the prohibition against federal court interference with the collection of state taxes that Congress provided in the Tax Injunction Act.

II. On the merits, the decision below erroneously construed the Farm Credit Act of 1971, 12 U.S.C. 2077, to exempt production credit associations from state sales and income taxes. The Farm Credit Act of 1933, which created production credit associations, gave them a broad exemption from taxation, but only for so long as the federal government maintained stock holdings in them. After 1968, the federal government has not held any stock in a production credit association. Since that time, therefore, the obligations of all such associations enjoyed a limited express exemption from taxation but the associations were liable for the types of state sales and income taxes Arkansas seeks to impose here.

In 1985, Congress enacted technical amendments that deleted the broader exemption from tax that had applied before 1968 to production credit associations that were partially owned by the federal government. In ruling that Congress evinced no intent to subject

production credit associations to state taxes, the court below in effect interpreted the 1985 technical amendments as if Congress had deleted the condition precedent to the broad exemption—the federal government's stock ownership—but had not deleted the exemption itself. There is no support in the language of the amendment or the history of Section 2077 for that extraordinary result.

Similarly, the statutory context of other lending institutions in the Farm Credit System demonstrates that Congress intentionally provided production credit associations with only a limited exemption from taxation only with respect to their obligations. Other entities in that System, such as farm credit banks and federal land bank associations, have been granted expressly the exemption that the court below held should be implied for production credit associations. Had Congress wished to confer on those associations the comprehensive tax exemption that it provided to other institutions in the Farm Credit System, it presumably would have done so. Because the associations' exemption from taxation is narrowly drawn to apply to their obligations alone, therefore, it does not extend to the sales and income taxes at issue.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION OF THIS ACTION, IN LIGHT OF THE TAX INJUNCTION ACT, 28 U.S.C. 1341

A. The Tax Injunction Act Prohibits Suits In Federal Court To Enjoin State Taxes Unless The Suit Is Brought To Assert Governmental Or Regulatory Functions Of The United States

The Tax Injunction Act, 28 U.S.C. 1341,[4] provides as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[5]

The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976). Notwithstanding the broad prohibition stated in the

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[4] Act of Aug. 21, 1937, ch. 726, 50 Stat. 738. See H.R. Rep. No. 1503, 75th Cong., 1st Sess. (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. (1937).

[5] The question of subject-matter jurisdiction is non-waivable and may be raised at any point in litigation. *Sumner* v. *Mata*, 449 U.S. 539, 547 n.2 (1981). This Court has held that the statutory prohibition contained in the Tax Injunction Act is jurisdictional and applies to suits for injunction or declaratory judgment. *California* v. *Grace Brethren Church*, 457 U.S. 393 (1982); *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990). *Cf. Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943).

Act, this Court has recognized an important exception to its reach: "[W]e conclude, in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966) (footnotes omitted).

1. As this Court recognized in *Department of Employment*, all of the cases in which the federal government theretofore had sought to avoid the prohibition contained in the Tax Injunction Act involved suits by the United States on behalf of itself or one of its instrumentalities. See 385 U.S. at 358 n.6 (collecting cases). At that time, neither this Court nor the lower federal courts had addressed whether a federal instrumentality suing on its own could avoid the limitation on district court jurisdiction contained in the Tax Injunction Act. And, in that case itself the United States and the American National Red Cross, as co-plaintiffs, had invoked the jurisdiction of a three-judge federal district court to seek an injunction against imposition of the Colorado unemployment compensation tax upon the Red Cross, as a federal instrumentality.

As the Court in *Department of Employment* also recognized, Congress evinced no intent in the legislative history to make the Tax Injunction Act applicable to the federal government. See 385 U.S. at 358 n.7 (citing legislative history). Instead, the particular problem Congress sought to ameliorate in the Act was the bringing of suits by out-of-state corporations to challenge state and local taxes in federal court proceedings that would not be available to in-state citizens. See S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2-3 (1937); 81 Cong. Rec. 1416-1417 (1937) (statement of Sen. Homer Bone). Because neither the language nor the history of the Tax Injunction Act contained any indication that the federal government's authority was to be restricted, the Court's recognition of an exception in *Department of Employment* adhered to the settled principle that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). See also *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947) ("There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.").

2. Although federal courts have long been barred from exercising jurisdiction over suits brought to stay pending proceedings in state courts, see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, codified at 28 U.S.C. 2283, the Tax Injunction Act was one of several federal statutes enacted in the wake of *Ex parte Young*, 209 U.S. 123 (1908), to limit the jurisdiction of federal district courts over actions brought to enjoin or declare invalid various types of state actions. The initial response by Congress to *Ex parte Young* was to require federal district courts composed of three judges to hear certain kinds of constitutional challenges to state actions. See generally C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4236-4237 (1988 & Supp. 1996). Subsequently, Congress enacted the Johnson Act, which deprived federal district courts of jurisdiction to enjoin the operation

of, or compliance with, any order of a state administrative agency or local rate-making body fixing rates for a public utility whenever specified conditions were met. Act of May 14, 1934, ch. 283, § 1, 48 Stat. 775, codified at 28 U.S.C. 1342. The Tax Injunction Act of 1937 was intended to apply similar principles of federalism and comity to prohibit actions brought in federal courts to enjoin or declare invalid state taxes. See, *e.g.*, 81 Cong. Rec. 1415 (1937); see generally C. Wright, et al., *supra*, § 4237.

Whether and in what circumstances federal instrumentalities may avoid these jurisdictional prohibitions in suits undertaken without the participation of the United States as a co-plaintiff[6] has not been definitively decided by this Court. Of the three statutory limitations on federal jurisdiction noted above—Sections 1341, 1342, and 2283—this Court has addressed that issue only under Section 2283.

In *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), this Court considered whether a federal agency with its own litigating authority in the lower courts is ex-

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[6] By statute, only the Department of Justice may represent the United States in litigation. Section 516 of Title 28 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

By statute, each production credit association has the power to "sue and be sued," 12 U.S.C. 2073(4), but that provision does not empower a production credit association to represent the United States in litigation; it only authorizes the production credit association to represent itself in the filing or defense of a lawsuit. See *ibid.*

empt from the proscription on enjoining state court proceedings contained in 28 U.S.C. 2283. In holding that Section 2283 does not prohibit the NLRB from suing in federal district court to enjoin a state court from limiting the rights of labor unions to engage in organizing activities, the Court observed that the "purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." 404 U.S. at 146. In *Nash-Finch*, the Court emphasized that it could not conclude that the general prohibition of Section 2283 "had as its purpose the frustration of federal systems of regulation." *Ibid.* The Court noted that it had previously held that suits brought in the name of the United States are exempt from the proscription of Section 2283, see, *e.g.*, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957), and that predecessor statutes to Section 2283 had been construed to permit federal agencies to seek injunctions in federal courts, *Bowles* v. *Willingham*, 321 U.S. 503, 510 (1944).

Nash-Finch thus establishes that an implied exception to Section 2283 exists for suits by a federal agency to enjoin state court proceedings in order to avoid frustration of "federal systems of regulation." 404 U.S. at 146. This Court has not had occasion to address whether a similar exception exists under Section 1341. It seems apparent, however, that imposition (for example) of a prohibitive excess tax on organizational picketing would interfere with the NLRB's regulatory responsibilities no less than the proceedings to enjoin such picketing that were at issue in *Nash-Finch*. Moreover, Section 2283, with its

express series of exceptions (none of which applied in *Nash-Finch*), is not textually more conducive than Section 1341 to an implied exception. We may assume for purposes of this case, therefore, that a similar exception would apply under Section 1341. "For the Federal Government and its agencies, * * * access to the federal courts is 'preferable in the context of healthy federal-state relations.'" *Nash-Finch*, 404 U.S. at 147 (quoting *Leiter Minerals*, 352 U.S. at 226).

B. This Court Need Not Address Whether An Exception To The Tax Injunction Act Applies For Suits Brought Only By Federal Instrumentalities Because Production Credit Associations Do Not Meet Any Of The Prevailing Tests For Avoiding The Act's Prohibition On Jurisdiction

1. As we describe in more detail in our brief at the petition stage (at pages 9-14), the courts of appeals have come to varying results in determining whether, and in what circumstances, a federal agency or instrumentality may, notwithstanding the Tax Injunction Act, bring suit in federal district court to enjoin state taxes when the United States is not a co-plaintiff. The most restrictive approach would find no such exception under Section 1341 when the federal instrumentality sues without the United States as a co-plaintiff. See, *e.g.*, *United States* v. *State Tax Comm'n*, 481 F.2d 963, 975 (1st Cir. 1973) (stating that it was "reasonable, as a prerequisite to by-passing normal state tax collection and litigation channels, that [federal instrumentalities] persuade the Attorney General of the United States, acting on behalf of [them], to join in their claim"); *Housing Auth. of Seattle* v. *Washington*, 629 F.2d 1307, 1311-1312 (9th Cir. 1980) (suggesting that federal instrumentality could not avoid the Tax Injunction Act without the United States as a co-plaintiff).

A less restrictive approach, more compatible with the rationale of *Nash-Finch*, follows "a flexible test in which 'each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.'" *Bank of New England Old Colony, N.A.* v. *Clark*, 986 F.2d 600, 602-603 (1st Cir. 1993) (quoting *Federal Reserve Bank of Boston* v. *Commissioner of Corporations & Taxation of Massachusetts*, 499 F.2d 60, 64 (1st Cir. 1974)). Under that approach, courts have scrutinized the legislation pursuant to which the federal instrumentality operates to ascertain whether the interests it is pursuing are "indistinguishable from those of the sovereign [such that] there are good reasons to relieve them of any symbolic requirement of joinder with and by the United States." *Federal Reserve Bank*, 499 F.2d at 62.[7]

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[7] A number of cases addressing whether a federal instrumentality may avoid the Tax Injunction Act have involved the Federal Deposit Insurance Corporation (FDIC), acting in its various capacities as regulator or receiver of savings institutions. See, *e.g.*, *Simon* v. *Cebrick*, 53 F.3d 17, 22-23 (3d Cir. 1995); *FDIC* v. *City of New Iberia*, 921 F.2d 610, 613 (5th Cir. 1991). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, contains explicit and detailed provisions (see, *e.g.*, 12 U.S.C. 1821(d) and 1825(b)(2)) with respect to the operations of the FDIC as receiver of insolvent institutions that may constitute specific modifications of, or limitations upon, the operation of the Tax Injunction Act insofar as the FDIC as receiver is concerned. See, *e.g.*, *Simon* v. *Cebrick*, *supra*; *Donna Indep. Sch. Dist.* v. *Balli*, 21 F.3d 100 (5th Cir. 1994); *Matagorda County* v. *Russell Law*, 19 F.3d 215 (5th Cir. 1994);

Under any of the approaches that have heretofore prevailed in the courts of appeals, the district court would lack jurisdiction to consider petitioner's claim as a "federal instrumentality" able to overcome the prohibition of the Tax Injunction Act. First, the United States is not a co-plaintiff in this lawsuit. See *Housing Auth.*, 629 F.2d at 1311. Thus, this Court's decision in *Department of Employment* is not directly controlling. Second, no substantial governmental or regulatory interest is at stake that warrants keeping the suit in federal, as opposed to state, court. See *Bank of New England*, 986 F.2d at 602-603; *FDIC* v. *New York*, 928 F.2d 56, 59 (2d Cir. 1991). And finally, the production credit associations at issue are not acting as "arms of the federal government," such that a state tax "call[s] directly into question the sovereign interest of the United States." *Federal Reserve Bank*, 499 F.2d at 62. Thus, respondents are not analogous to the NLRB in *Nash-Finch* because the production credit associations seeking to avoid the prohibition in the Tax Injunction Act here can assert no sovereign governmental function or federal regulatory purpose.

Accordingly, it is sufficient in deciding this case for the C[illegible]rt to hold that production credit associations do not assert any sovereign interest to justify finding an implied exception to the Tax Injunction Act in a suit in which the United States is not a co-plaintiff. Like the intervening federal savings and

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FDIC v. *Lowery*, 12 F.3d 995 (10th Cir. 1993). Since this case does not involve the FDIC, and the cases set forth in the text involved the Tax Injunction Act without any asserted modification by FIRREA, that statute and the decisions under it have no bearing on this case.

loan associations involved in the First Circuit's decision in *State Tax Commission*, *supra*, in their operation and function respondents are private lending institutions subject to control comparable to that applicable to state-organized and -controlled lending institutions. The government of the United States launched them with financial support, but that support has been long since withdrawn, and they now act in the interests of themselves and their members.

2. In response to our brief at the petition stage, respondents cite cases involving federal land banks in support of their contention that they "are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.'" Resp. Br. in Response to Br. for U.S. as Amicus Curiae 5 (quoting *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941)). See also *ibid.* (quoting *Federal Land Bank of Wichita* v. *Board of County Comm'rs*, 368 U.S. 146, 150-151 (1961)). Those cases did not involve whether the federal land banks were "federal instrumentalities" for purposes of the Tax Injunction Act. Both cases came to this Court on writs of certiorari to state supreme courts.

Numerous cases in the lower courts have recognized that an entity may be a "federal instrumentality" for some purposes but not others.[8] Thus, even if

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[8] Thus, production credit associations, for example, have been held not to be federal instrumentalities for purposes of gaining an additional 30 days in which to file an appeal (which the government receives), see, *e.g.*, *Hoag Ranches* v. *Stockton Prod. Credit Ass'n*, 846 F.2d 1225, 1228-1229 (9th Cir. 1988), but they have been found to be federal instrumentalities that are immune from punitive damage awards, see, *e.g.*, *Smith* v. *Russellville Prod. Credit Ass'n*, 777 F.2d 1544, 1550 (11th Cir.

a federal instrumentality is not exempt from the strictures of the Tax Injunction Act, there may be circumstances in which it would succeed on the merits of avoiding state taxes because its underlying statute confers on it, as was the case for the federal land banks, an applicable exemption from taxation. That is a different issue, however, from whether the "federal instrumentality" sufficiently performs governmental or regulatory functions to be entitled to an implied exemption from the jurisdictional prohibition of the Tax Injunction Act.[9]

For these reasons, the case should have been dismissed for lack of subject-matter jurisdiction.

1985). We express no view on the correctness of those decisions, save to observe that the statutory context in which the issue of federal instrumentality status arises may dictate differing results for the same entity. Compare *Irwin Memorial Blood Bank* v. *American Nat'l Red Cross*, 640 F.2d 1051, 1057 (9th Cir. 1981) (Red Cross is not federal instrumentality for application of Freedom of Information Act) with *United States* v. *City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990) (distinguishing *Irwin Memorial* and holding that Red Cross is a federal instrumentality for tax purposes), cert. denied, 501 U.S. 1250 (1991). Correspondingly, this case presents no occasion for this Court to address the question of federal instrumentality status in other legal contexts, or in the factual contexts of the diverse federal instrumentalities not before the Court.

[9] Respondents further contend that production credit associations are federal instrumentalities because Congress reiterated that fact and provided federal financial assistance to institutions in the Farm Credit System in the Agricultural Credit Act of 1987. See Resp. Br. in Response to Br. for U.S. as Amicus Curiae 6. That argument proves too much, since it would suggest that Congress intends to create an exception to the Tax Injunction Act every time it appropriates federal assistance to any recipient. There is no support in the text or history of the 1987 Act for such a broad rule.

II. THE LEVY OF SALES AND INCOME TAXES BY THE STATE OF ARKANSAS UPON PRODUCTION CREDIT ASSOCIATIONS IS CONSISTENT WITH THE FARM CREDIT ACT

On the merits, the court below relied on circuit precedent that, "[w]here there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." Pet. App. A5 (quoting *Federal Reserve Bank of St. Louis* v. *Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981), aff'd, 455 U.S. 995 (1982)). In the court's view, the 1985 amendments to the Farm Credit Act that removed the exemption from state taxation for production credit associations in which the United States held an ownership interest were immaterial, because the statute now contains "no provision * * * which indicates an intent on the part of Congress to waive the [production credit associations'] tax immunity as federal instrumentalities." *Id.* at A6.

The court's reliance on an implied immunity from state taxation in the context of the Farm Credit Act was erroneous. As this Court has made clear, while "absent express congressional authorization[] a State cannot tax the United States directly," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989) (citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), Congress determines whether, and to what extent, instrumentalities performing federal functions are exempt from state and local taxation. *United States* v. *New Mexico*, 455 U.S. 720, 733-735, 737-738, 743-744 (1982); *Department of Employment*, 385 U.S. at 358, 359-361. The language, structure, and history of the Farm Credit Act make clear that Con-

gress intended for privately owned, for-profit production credit associations to be subject to the types of sales and income taxes Arkansas seeks to impose.

A. By Its Plain Terms, Section 2077 Confers Only A Narrowly Defined Tax Exemption Inapplicable Here Rather Than A Broad Exemption From State Sales And Income Taxes For Production Credit Associations

1. Since the original enactment of the Farm Credit Act in 1933, Congress has declared that all production credit associations are federal instrumentalities—regardless of whether the federal government owned any stock in them—and that, as such, their "notes, debentures, bonds, and other such obligations * * * shall be exempt both as to principal and interest from all taxation" except for "surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. If the federal government held an ownership interest in a production credit association, a broader exemption from all state and federal taxes applied. *Ibid.*; see App., *infra*, 3a-4a; Pub. L. No. 92-181, § 2.17, 85 Stat. 602. By 1968, however, the provision conferring the broader exemption from state taxation no longer had any practical effect, because the federal government did not hold any stock interest in any production credit association. See H.R. Rep. No. 425, *supra*, at 116.

In 1985, Congress restructured the Farm Credit System and withdrew the federal government's authority to own stock directly in production credit associations. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. As part of this effort to make the System more self-sufficient, Congress created the Farm Credit System Capital Corporation to provide emergency investments in System entities with capital raised from within the System. Pub. L. No. 99-205, § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. For the future, any federal government financial support was limited to investments in the Capital Corporation. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. As a result of that restructuring, Congress also passed various technical amendments to 12 U.S.C. 2077 (formerly codified at 12 U.S.C. 2098 (Supp. III 1985)). Those amendments deleted the reference to the federal government's stock ownership in the associations and the part of Section 2077 that authorized the broader exemption from federal and state taxation when the federal government owns stock in a production credit association. From its inception in 1933 to the present, therefore, nothing in the language of Section 2077 or its precursors supports the court of appeals' holding that Congress intended to create an exemption from state sales and income taxes for privately owned production credit associations.

2. Nor does anything in the legislative history of Section 2077 suggest such an intent. Because the statutory language prior to 1985 was unequivocal on this point, the court of appeals' conclusion must rest on Congress's intent in enacting the 1985 amendments. Yet nothing in the legislative history of those amendments suggests that Congress intended to grant to production credit associations any revived or new immunities from taxation. Indeed, in removing prior provisions authorizing the federal government to maintain direct stock holdings in the associations, as well as the original provisions conferring the broader exemption from state tax when the United States holds an ownership interest in the asso-

ciations, the legislative history specifies that Congress intended to make only "technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28. If Congress had intended to alter the status quo in the 1985 amendments and to create a broad immunity from taxation for privately owned production credit associations, it is unlikely to have done so by a "technical amendment." See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative history] * * * while contemplating an important and controversial change in existing law is unlikely."). Yet the decision below in effect assumes the exact opposite: even though Congress had explicitly created an exemption from taxation only in certain specifically defined contexts, the court nonetheless held that Congress impliedly intended to establish a much broader exemption. See Pet. App. A6.

The court's assumption is particularly implausible in view of the history of Section 2077. Congress had never before granted a privately owned production credit association a comprehensive immunity from taxation. See, *e.g.*, *Columbus Prod. Credit Ass'n* v. *Bowers*, 180 N.E.2d 1 (Ohio), cert. denied, 371 U.S. 826 (1962); *Woodland Prod. Credit Ass'n* v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Dist. Ct. App. 1964) ("It is difficult * * * to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."). Moreover, the context in which the 1985 amendments were enacted is contrary to the assumption that Congress intended the technical amendments to work the sweeping change attributed to them by the court below. Congress was well aware that production credit associations are

for-profit private entities chartered by the federal government and that, altogether, they maintain billion-dollar loan portfolios and receive billions of dollars in gross income. Consequently, Congress intended in the 1985 amendments not to subsidize the production credit associations, but rather to give the Farm Credit System the tools with which to use existing capital in the System to aid those with special financial needs. See H.R. Rep. No. 425, *supra*, at 7-8, 11-12. The history behind Section 2077, therefore, does not support the court of appeals' holding that Congress, by implication, newly conferred upon production credit associations a broad-based exemption from federal, state, and local taxes.

B. The Overall Context And History Of The Farm Credit Act Also Negate The Claim Of Immunity In This Case

From the original enactment of the Farm Credit Act, Congress explicitly determined which federally chartered lending institutions within the Farm Credit System are entitled to comprehensive immunity from taxation and which are not. In addition to production credit associations, the Farm Credit System includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a). With respect to each entity, the Farm Credit Act contains a "taxation" provision that delineates specifically the immunity from taxes enjoyed by that entity. See 12 U.S.C. 2023 (farm credit banks), 2077 (production credit associations), 2098 (federal land bank associations), 2134 (banks for cooperatives). For farm credit banks and federal land bank associations, Congress explicitly provided the type of comprehensive immunity that the court of appeals held to be

implied here for production credit associations. For example, under 12 U.S.C. 2022,

> [t]he Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed.

That exemption is almost identical to the language for federal land bank associations in 12 U.S.C. 2098. As to both entities, the exemption language has been largely unchanged since the Farm Credit Act of 1971. See Pub. L. No. 92-181, §§ 1.21, 2.8, 85 Stat. 590, 597.[10]

By contrast, banks for cooperatives have been granted only the limited exemption from taxation accorded to production credit associations with respect to their obligations. See 12 U.S.C. 2134. Prior to the 1985 amendments to the Farm Credit Act, banks for cooperatives (like production credit associations) also possessed a broad-based exemption from taxation that was contingent upon the United States' stock ownership. See Pub. L. No. 92-181, § 3.13, 85

[10] Section 1.21 of the Farm Credit Act of 1971 addressed the taxation of both federal land banks and federal land bank associations. Section 2.8 referred to the taxation of federal intermediate credit banks. Federal land banks and federal intermediate credit banks were merged and became "farm credit banks" under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 410, 101 Stat. 1637 (1988) (codified at 12 U.S.C. 2011(a)). As part of the 1987 Act, the taxation statutes were redesignated as Sections 1.15 and 2.17 for farm credit banks and federal land bank associations, respectively. Pub. L. No. 100-233, § 401, 101 Stat. 1629, 1637.

Stat. 608. That contingent exemption was repealed in 1985 by the same technical amendments that applied to the associations. See Pub. L. No. 99-205, § 205(e)(10), 99 Stat. 1705.

Congress thus "intentionally and purposely" chose to grant an expansive immunity from taxation to farm credit banks and federal land bank associations, while at the same time conferring a more limited exemption (concerning only their notes, debentures, and other obligations) with respect to production credit associations and banks for cooperatives. Had Congress wished to confer upon production credit associations the more comprehensive exemption from taxation that it had provided to federal credit banks and federal land bank associations, it presumably would have done so expressly as it had elsewhere in the Farm Credit Act. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress, however, did not "write the statute that way." *Russello*, 464 U.S. at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).[11]

[11] Congress also has demonstrated its ability to provide federal instrumentalities with broad exemptions from state taxation outside of the Farm Credit Act. For example, in the Federal Credit Union Act, Pub. L. No. 86-354, 73 Stat. 628 (1959) (12 U.S.C. 1751 *et seq.*), federal credit unions, their property, their funds, and their income are exempt from all federal, state or local taxation, except that, like farm credit banks, their real and personal property are subject to taxation "to the same extent as other similar property is taxed." 12

The effect of the court of appeals' decision is to grant to respondents a tax exemption equal to or potentially greater than that which Congress explicitly provided to farm credit banks and federal land bank associations (see Pet. App. A11 & n.5 (Loken, J., dissenting)). That result alters significantly the extent to which States and localities have been empowered to tax production credit associations since at least 1968—an empowerment that has resulted in millions of dollars in tax revenues. See, *e.g.*, Farm Credit Admin., *42nd Annual Report of the Farm Credit Administration: 1974-1975*, at 87 (1976). Nothing in Section 2077, the Farm Credit Act as a whole, or the pertinent legislative history indicates that Congress meant for its 1985 "technical" amendments to effect such a sweeping change.

U.S.C. 1768. Federal reserve banks have been granted similarly expansive tax exemptions as well. 12 U.S.C. 531. Those statutes further point up the illogic in the court's holding and in respondents' arguments in support of it—namely, that Congress *sub silentio* granted production credit associations a comprehensive exemption from all federal, state, and local taxation.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions that it be dismissed by the district court for lack of subject-matter jurisdiction. In the alternative, the judgment of the court of appeals should be reversed on the merits.

Respectfully submitted.

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APPENDIX

1. The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*), provides in pertinent part as follows:

* * * * *

§ 2002. Farm Credit System

(a) Composition

The Farm Credit System shall include the the[1] Farm Credit Banks, the Federal land bank associations, the production credit associations, the banks for cooperatives, and such other institutions as may be made a part of the System, all of which shall be chartered by and subject to regulation by the Farm Credit Administration.

* * * * *

§ 2071. Organization and Charters

(a) Charter

Each production credit association shall continue as a Federally chartered instrumentality of the United States.

(b) Organization

(1) In general

Production credit associations may be organized by 10 or more farmers or ranchers or producers or harvesters of aquatic products desiring to borrow money under the provisions of this part.

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[1] So in original. [Second "the" probably should not appear.]

* * * * *

(7) Approval of articles

On approval of the proposed articles by the Farm Credit Administration, and on the issuance of a charter, the association shall become as of such date a federally chartered body corporate and an instrumentality of the United States.

* * * * *

§ 2077. Taxation

Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

2. Section 2.17 of the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 602, prior to its amendment by Section 205(e)(16) of the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1705 (1985), provided as follows:

> SEC. 2.17. TAXATION. Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now

> or hereafter imposed by the United States or any State, territorial, or local taxing authority. Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

3. Section 63 of the Farm Credit Act of 1933, ch. 98, 48 Stat. 267, provided as follows:

> SEC. 63. The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any

State, Territorial, or local taxing authority. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.

(9)

No. 95-1918

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF ARKANSAS

Petitioner,

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, et al.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR *AMICI* STATES OF OHIO, ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 27 other *amici* States write to urge the Court to reverse the decision of the United States Court of Appeals for the Eighth Circuit and to explain why the issues presented matter not just to Arkansas but to all of her sister States.

Either one of two questions could control the disposition of this case: (1) Does the Tax Injunction Act bar this challenge to State taxes from being entertained in district court? and (2) Has Congress granted production credit associations immunity from State sales and income taxes? The answers to both questions implicate vital issues of federalism and State sovereignty.

The Tax Injunction Act protects two essential attributes of State sovereignty -- the power to tax and the power to determine how, when, and where States defend challenges to their taxes. The Act thus "embodie[s] Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 515 n.19 (1981). In this instance, by claiming that any lending institution labeled a federal instrumentality may sue in federal court, respondents seek to create a significant exception to the Act's cardinal policy of noninterference with State taxes. The *amici* States wish to prevent this dilution of the Act.

The immunity questions raised by respondents also have far-reaching consequences to the States. The decision below releases respondents from income and sales tax obligations that most other corporate citizens (including most other banks) pay for the privilege of doing business in Arkansas. But the real cost of the Eighth Circuit's ruling cannot be measured just by Arkansas' loss of revenue from all Production Credit Associations ("PCAs") per year, or by

the cost to the other States from this loss of revenue. A more accurate dollars-and-cents assessment must account for the potential loss of revenue from other entities within the Farm Credit System.

Ohio, to use one example, is currently defending a similar action in federal court filed by an "agricultural credit association" ("ACA"), an entity that constitutes a merger of one PCA and two federal land bank associations. Other *amici* States face similar claims by lending institutions chartered within the Farm Credit System in the wake of the decision below. Making matters worse is the fact that, until recently, all jurisdictions agreed that PCAs were subject to most State taxes unless the federal government owned shares in the PCA (which is not true here). *See, e.g., Baker Production Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984 (Ore. 1966); *Woodland Production Credit Ass'n v. Franchise Tax Bd.*, 225 Cal. App.2d 293, 37 Cal. Rptr. 231 (1964); *Columbus Production Credit Ass'n v. Bowers*, 180 N.E.2d 1 (Ohio), *cert. denied*, 371 U.S. 826 (1962).

SUMMARY OF ARGUMENT

1. The lower federal courts should not have entertained this challenge to the Arkansas sales and income tax. Under the Tax Injunction Act, 28 U.S.C. 1341, States cannot be haled into federal court against their will in actions seeking to enjoin the collection of taxes. The bar is absolute and jurisdictional in nature. It reflects a broad congressional policy of federal noninterference with one of the most basic responsibilities of a sovereign State -- to raise revenue for the public welfare. *California v . Grace Brethren Church*, 457 U.S. 393, 410-11 (1982). In view of the vital nature of this State responsibility, underlying comity concerns and the pre-existing requirement of a "plain, speedy and efficient remedy" in State court, exceptions to the Act receive a

narrow construction. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 524 (1981)(noting that the Act's "broad, prophylactic language" precluded "expansive exception"). Accordingly, clear congressional direction is needed to obtain an exemption from the Act.

a. No congressional direction, clear or otherwise, exists here to exempt federal instrumentalities from the Act. The most that can be said is that respondents are "federally chartered instrumentalities." Yet no holding of this Court (or even of the lower courts that have addressed the issue) establishes that such labeling by itself suffices to overcome the Tax Injunction Act's lofty jurisdictional bar.

Nor does the United States' authority to bring such actions change things. Under *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), it is true, "suits by the United States to protect itself and its instrumentalities from unconstitutional exaction" do not violate Tax Injunction Act. But in this instance the United States has not joined the action "to protect . . . its instrumentalities." On the contrary, it has entered the case to say that the PCAs *do not* have authority under the Tax Injunction Act to bring their own state-tax challenges in federal court. What is more, the availability of the United States to join an action to protect important federal interests, as well as the authority of Congress clearly to grant a Tax Injunction Act exemption to some or all federal instrumentalities when it sees fit, are precisely the kinds of safety valves that makes the States' interpretation fair, legitimate and workable.

Far less workable (and no more fair) is the suggestion that the Court should engage in an importance-to-the-federal-government inquiry in determining whether a given instrumentality may overcome the jurisdictional bar of the Act. As an initial matter, this inquiry has little relevance to

PCAs. These Depression-era lending institutions are no longer owned in any way by the federal government and are akin in every relevant respect to other private lending institutions and banks. Under any assessment of governmental importance, it is difficult to see how PCAs could meet the test. But, more importantly, the test itself is not workable. No clear lines exist and none are likely to emerge under such an elusive inquiry.

b. The Court should reject respondents' interpretation of the Act for a second reason: It will avoid another jurisdictional problem, one that is constitutional in nature. Under the Eleventh Amendment, States may not be subjected to federal court actions against their will. While *Ex Parte Young*, 209 U.S. 123 (1908), creates an exception to this rule for injunctive actions, the exception does not apply to injunctive actions filed directly against the State itself, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Here, respondents have named only the State of Arkansas as a defendant, not State officials acting in their official capacity. Nor does respondents' status as "federally chartered instrumentalities" solve this problem. Such entities do not receive the benefits of the United States' exemption from the Eleventh Amendment. *See Smith v. Reeves*, 178 U.S. 436, 445-46 (1900).

2. Even if the lower federal courts properly had jurisdiction over this claim, they erred in assessing the claim on the merits. PCAs simply are not immune from State sales and incomes taxes.

From their inception in 1933, PCAs received an exemption from such State taxes as sales and income tax, but only if the federal government held stock in the PCA. Thus, if the federal government held stock, the PCA was exempt. Otherwise, it was not. In recent times, this narrow

exemption became meaningless because the federal government no longer held stock in any of the PCAs. Responding to this development, Congress eliminated the exemption in 1985 in a series of technical amendments to the statute. Under current law, then, Congress provides no exemption to PCAs from State sales and income tax. Instead, it simply continues to provide a long-held State and federal tax exemption from taxation on the principal and interest of "notes, debentures, and other obligations issued" by PCAs. 12 U.S.C. 2077.

This chronology of amendments can lead to only one plausible conclusion: PCAs previously had an exemption from State sales and income taxation if the federal government owned shares in the lending institution; the exemption became archaic; Congress eliminated the exemption; PCAs themselves no longer enjoy any exemption from State sales and income tax. A contrary view requires too many inferential leaps, and leaves too many questions unanswered. But even ignoring this sequence of events, there is another problem with respondents' argument. A focus on the current statutory exemption simply does not support the argument that Congress exempted PCAs from State sales and incomes taxes. How can a narrow exemption for "notes, debentures, and other obligations issued by" PCAs plausibly extend to sales and income taxes imposed on the PCAs themselves? Such language does not begin to immunize PCAs from these customary costs of doing business, let alone do so clearly.

ARGUMENT

I. THE TAX INJUNCTION ACT PROHIBITS FEDERALLY CHARTERED LENDING INSTITUTIONS FROM CHALLENGING STATE TAXES IN FEDERAL COURT.

A. The Tax Injunction Act Bars This Claim.

On its face, the Tax Injunction Act creates an absolute jurisdictional bar to this action:

> The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. 1341. "[P]redicated upon the desirability of freeing, from interference by the federal courts, state procedures" for collecting taxes, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Act bars federal court actions to obtain injunctive and declaratory relief from state taxes, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). The legislation reflects a broad congressional policy of federal noninterference with one of the most basic attributes of State sovereignty -- to raise revenue for the public welfare. *Grace Brethren*, 457 U.S. at 410-11. *See Tully v. Griffin, Inc.*, 429 U.S. 268, 73 (1976) (the Act is rooted in "the imperative need of a State to administer its own fiscal operations").

In this instance, the text of the Act itself would seem to answer the question presented. Because respondents do not challenge the availability of a "plain, speedy and efficient remedy" in the Arkansas state courts, the statute by its terms

bars the action.

In light of the overriding dictates of the Supremacy clause, however, the Court has engrafted a narrow exception onto the Act for actions brought by the United States. Section 1341 thus "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). While this exception would permit the United States to bring an action on behalf of respondents to protect an interest of the United States, it by no means permits federal instrumentalities to bring such actions on their own. Add to this the fact that exceptions to the Tax Injunction Act must be narrowly construed because of the absolute, "prophylactic" language of the statute, *Rosewell*, 450 U.S. at 524, and it becomes clear that respondents cannot rely on the United States' exemption in this instance.

Nor does *Department of Employment* itself advance respondents' argument. All it establishes is that the United States may sue to enjoin State taxation, not that federally chartered corporations may do so themselves. Indeed, the language of the Court's holding -- that Section 1341 "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities," 385 U.S. at 358 -- seems to embrace the States' position. The answer to a federal instrumentality's dissatisfaction with a local tax, the decision suggests, is not to sue on its own behalf in federal court. Rather, the answer is to convince the United States to file the claim itself; or, failing that, to bring the claim in state court.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), is no more helpful to respondents. At issue was whether certain Indian tribes could enjoin State taxation in

federal court under 28 U.S.C. 1362. The statute granted the district courts "jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Even though Section 1362 plainly expanded jurisdiction for Indian tribe actions beyond that already contemplated by the general federal question statute, *Moe* was reluctant to infer an exception from the across-the-board bar of the Tax Injunction Act. "[T]he mere fact that a jurisdictional statute such as sec. 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of sec. 1341." *Id.* at 472. Still, the Court found for the tribes on the ground that the statutory text, along with other tools of statutory construction, showed that Congress meant the tribes to have the same power that the United States had traditionally exercised as trustee to assert their rights in federal court. *Moe* thus concluded that Section 1362 brought the tribes within the United States' own exemption under *Department of Employment*. *Id.* at 473.

Far from helping respondents, *Moe's* narrow holding demonstrates the kind of clear legislative direction Congress must give in exempting entities from the Tax Injunction Act. Such direction, clear or otherwise, simply does not exist here. To begin with, no existing legislation confers special federal court jurisdiction over matters involving federal instrumentalities. Unlike *Moe*, a barren legislative landscape greets those looking for congressional direction that federal instrumentalities should be entitled to a special exemption from the broad terms of the Tax Injunction Act. On that basis alone, in view of the clear prohibition of the Act, respondents' argument should be rejected.

But even if one searches further, little else exists to

sustain such an exemption. All one sees are three references to the PCAs' status as "federal instrumentalities". The Agricultural Credit Act of 1987 refers to PCA "instrumentality" status in these discrete ways:

* "Each production credit association shall continue as a Federally chartered instrumentality of the United States." 12 U.S.C. 2071(a):

* "On approval of the proposed articles ... the [production credit] association shall become as of such date a federally chartered body and instrumentality of the United States." 12 U.S.C. 2071(b)(7).

* "Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation ... imposed by the United States or any State" 12 U.S.C. 2077.

Respondents contend, as they must, that these isolated references illustrate Congress's determination to grant the same Tax Injunction Act exemption to PCAs that the United States now enjoys. That is wrong. None of the references mentions federal jurisdiction, as in *Moe*, and none begins to establish an exemption with the kind of clear language that the Court has required. On this record, respondents' argument ultimately boils down to the sweeping proposition that "instrumentality" status by itself warrants the conclusion that Congress meant to permit a Tax Injunction Act waiver. While the decision to call PCAs federal "instrumentalities"

is not an insignificant factor, such labeling has never been enough to overcome the absolute jurisdictional bar established by the Tax Injunction Act.

Moreover, the availability of the United States to join an action to protect important federal interests, as well as the authority of Congress clearly to grant Tax Injunction Act exemptions to federal instrumentalities when it sees fit, are precisely the kinds of safety valves that makes the States' interpretation fair, legitimate and workable. *Housing Authority of Seattle v. State of Washington Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir. 1980) ("We agree that [joinder of the United States] is necessary before a federal instrumentality can overcome the restriction of the [Tax Injunction Act]."). Far less workable (and no more fair) is the suggestion that the Court should engage in an importance-to-the-federal-government inquiry in determining whether a given instrumentality may overcome the jurisdictional bar of the Act. The test just is not workable. No clear lines exist and none is likely to emerge under such an elusive inquiry. *See, e.g., Simon v. Cebrick*, 53 F.3d 17, 22-23 (3d Cir. 1995) (finding that FDIC was exercising a sufficient governmental role to enjoy the exception to the Tax Injunction Act); *Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600 (1st Cir. 1993) (denying exemption to FDIC under functional approach); *FDIC v. State of New York*, 928 F.2d 56, 59 (2d Cir. 1991) (denying exemption to FDIC under functional approach because it was serving primarily private commercial interests in its function of assisting, or serving as receiver of, private banks); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 613 (5th Cir. 1991) (finding exemption for FDIC in construing its jurisdictional statutes); *Federal Reserve Bank of Boston v. Commissioner of C & T*, 499 F.2d 60 (1st Cir. 1974) (permitting suits by instrumentalities that can be viewed as "arms of the government," which included the Federal

Reserve Bank of Boston); *United States v. State Tax Comm'n*, 481 F.2d 963 (1st Cir. 1973) (permitting suits by instrumentalities that can be viewed as "arms of the government," which did not include federal savings & loan associations).

No doubt the rule we advance does run up against one possibility that at first blush seems counter-intuitive -- that the Federal Reserve Bank could not of its own volition sue in federal court. *See Federal Reserve Bank*, 499 F.2d 60. However, the requirement that exceptions to the Tax Injunction Act be clearly provided, the availability of assistance from the United States when the matter is urgent, and the ever-present possibility of a permanent congressional exemption seem to be the best answers to this possibility. This approach accords with the historical requirement that Congress specifically provide for federal jurisdiction over actions involving federally chartered instrumentalities. *Compare Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61 (1809) *with Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

At any rate, even if the Court were to adopt one of the functional tests employed by the lower courts, respondents would still come up short. The federal government has not held had any ownership interest in the PCAs since 1968. Today, these Depression-era creations thus bear far more resemblance to run-of-the-mill banks than they do to any arms of the government. In fact, Congress has expressly denied district court jurisdiction premised solely upon the existence of a federal charter, unless the federal government owns at least fifty percent of the shares of the corporation. *See* 28 U.S.C. 1349 ("The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is

owner of more than one-half of its capital stock.").

Finally, the reach of respondents' contrary argument is illustrated by the fate it would have met prior to 1937, before the Tax Injunction Act was even passed. Though lacking legislation to limit State tax challenges filed in federal court, the courts usually denied requests for injunctive relief on equitable grounds, namely the failure to establish irreparable harm or the failure to show the unavailability of an adequate remedy at law. The federal courts saw in the adequate-remedy element a vehicle for effectuating comity between federal and state courts and avoiding excessive interference with the fiscal operation of State and local government. *Dows v. City of Chicago*, 78 U.S. 108 (1871); *Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932). Indeed, prior to 1937, the Eighth Circuit rejected an attempt to file a State tax challenge in federal court that in many respects parallels this one. *See Hammerstrom v. Toy Nat. Bank of Sioux City*, 81 F.2d 628, 636 (8th Cir.) (rejecting attempt by two national banks and one joint-stock land bank to recover State taxes), *cert. denied*, 299 U.S. 546 (1936). It would be ironic if the Tax Injunction Act provided less protection to State tax administration than *before* the Act was passed.

B. Respondents' Interpretation Of The Act Implicates A Constitutional Question Of Eleventh Amendment Immunity.

A contrary interpretation also raises another problem. If the Court concludes that federal instrumentalities enjoy the same exemption from the Tax Injunction Act that the United States enjoys, another jurisdictional question arises, which is constitutional in nature. Under the Eleventh Amendment, States may not be subjected to federal court actions against their will. While *Ex Parte Young*, 209 U.S. 123 (1908)

creates an exception to this rule for injunctive actions, the exception does not apply to injunctive actions filed against the State *itself, see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (requiring dismissal of State and State agency from injunctive relief against State officials). Notably, respondents have named only the State of Arkansas as a defendant, not State officials acting in their official capacity. Nor can respondents maintain that "federally chartered instrumentalities" receive the benefits of the United States' exemption from the Eleventh Amendment. The Court has already rejected that position. *See Smith v. Reeves*, 178 U.S. 436, 445-46 (1900) (holding that federally-chartered corporations are subject to Eleventh Amendment restrictions).

The Court, however, may avoid this constitutional problem. The issue disappears under either of two interpretations -- that federal instrumentalities do not enjoy the same exemption from the Tax Injunction Act that the United States enjoys (save when the United States enters the case), or that PCAs generally do not enjoy this exemption. *See Gomez v. United States*, 490 U.S. 858, 864 (1989)("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); *Jean v. Nelson*, 472 U.S. 846, 856-57 (1985). Either way, jurisdiction to entertain this claim in federal court simply does not exist on this record.

II. CONGRESS HAS NOT GRANTED PRODUCTION CREDIT ASSOCIATIONS IMMUNITY FROM STATE SALES AND INCOME TAX.

Even if the Court concludes that the Tax Injunction

Act does not apply here and even if it concludes that the Eleventh Amendment does not separately deprive the lower federal courts of jurisdiction to entertain this action, respondents face another obstacle: They are wrong on the merits. Congress has not immunized PCAs from State sales and income taxes.

As a starting point, the act of immunizing a business from state taxation represents an extraordinary exercise of federal power. It limits one of the most essential attributes of a sovereign. The power to tax, this Court has emphasized, is "the most basic power of government." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). The Court thus has been careful narrowly to construe such exemptions and, what would seem to come to the same end, to require that such exemptions be clearly provided. *See, e.g., Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established"); *Smith v. Davis*, 323 U.S. 111, 119 (1944) (requiring "a clear indication of an intent to immunize from state taxation"); *Graves v. People of the State of New York*, 306 U.S. 466, 483 (1937) (such immunity should "be narrowly restricted").

In this instance, Congress has neither clearly nor impliedly immunized PCAs from State taxation. Prior to 1985, Congress provided the following exemptions to the credit associations:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except

> surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. ***Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.***

Farm Credit Act of 1971, Pub. L. 92-181, sec. 2.17, 1971 U.S.C.C.A.N. 678 (formerly codified at 12 U.S.C. 2098). This language, which is drawn from the 1971 statute, varies in form but not substance from the language of the original 1933 statutes. *See* Pub. L. 73-98, sec. 63, 48 Stat. at 276 (1933).

Thus, from 1933 through 1985, Congress provided two essential exemptions: One for bond interest and principal; the other for most other taxes (including sales and income tax) so long as the PCA was owned in part by the federal government. By 1968, however, the latter exemption

had become obsolete. "[A]ll PCAs were owned entirely by their borrower members." Pet. App. at A-10, 76 F.3d at 966.

Recognizing this development, Congress deleted the sales and income tax exemption in the Farm Credit Amendments of 1985. Under current law (and the law applicable to this case), the exemption provision reads as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority.

12 U.S.C. 2077.

The removal of the exemption thus eliminates the availability of any sales and income tax exemption for the PCAs -- as distinguished from exemptions for their bonds and other interest-bearing instruments, which continue. To read the amendment any other way is to conclude that Congress used the removal of a narrow immunity exemption somehow to create a gaping immunity exemption. Under any principle of statutory construction -- clear statement or otherwise -- that makes little sense. Nor can the remaining exemption for bond interest and principal be stretched to cover an exemption from State sales and income taxes impose on the PCAs themselves. Pet. App. at A-11; 76 F.3d at 967 (Loker, J. dissenting) (noting that the majority

"has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption, for which no PCA remained eligible, as the grant of a far broader implied exemption.")

Confirming this interpretation is Congress's creation of tax immunities elsewhere in the United States Code for other members of the Farm Credit System. PCAs, like other members of the Farm Credit System, are covered by the Agricultural Credit Act of 1987. Throughout that legislation, Congress specifies for each entity the scope of immunities it intends to confer. See e.g., 12 U.S.C. 2023 (broad exemption for Farm Credit Banks); 12 U.S.C. 2098 (broad immunity for federal land bank associations); 12 U.S.C. 2134 (narrow immunity for banks for cooperatives). Ordinary principles of statutory construction give content to Congress's decision to omit language in one portion of an enactment that is included in other provisions of the same enactment. *See City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994), ["It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (citations omitted). Accordingly, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (internal quotations omitted).

Under these circumstances, the only conceivable justification for respondents' interpretation is to resurrect the view that the courts have authority to imply such immunities directly under the Supremacy Clause, even when Congress

has refused to do so itself. The precedent for judicially implying immunity, *see M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), has given way to following Congress's own immunity provisions because Congress regularly provides for the scope of immunity by statute -- something it did not do when it chartered the Second Bank of the United States in the early nineteenth century.

That the Court is reluctant judicially to imply immunity directly under the Supremacy Clause is reflected in several more recent cases. For example, in *Graves v. People of State of New York*, 306 U.S. 466 (1937), the Court declined to extend tax immunity to the income of employees of the Home Owners' Loan Corporation absent express exemption by Congress. Like the present case, Congress expressly exempted the Corporation's bonds from taxation. Rejecting the claim of a broader implied immunity, the Court noted:

> [T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

306 U.S. at 483. *See also First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1968).

The history of the Farm Credit System, moreover, shows that Congress always has specified the immunities it intended. The Farm Credit System immunity cases thus all turn on statutory interpretation. *See, e.g., Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941)(applying "federal instrumentality" concept as basis for Congress' power to immunize by statute); *Federal Land Bank of Wichita v. Bd. of County Commissioners*, 368 U.S. 146 (1961). Indeed, *Bismarck Lumber* teaches that Congress has broad power to immunize federally chartered "instrumentalities" when it sees fit to do so -- not that "instrumentality" status by itself requires that judges should imply immunity directly under the Supremacy Clause. *See also United States v. Detroit*, 355 U.S. 466, 474 (1958) ("Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve."); *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("[O]ur job is neither to assess the underlying merits of the program, nor to opine on whether Congress would be wise to exempt Ginnie Maes from state taxation. ... A court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established."); *Smith v. Davis*, 323 U.S. 111, 119 (1944) ("All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of government. That intent, which is largely codified in sec. 3701, should not be expanded or modified in any degree by the judiciary.").

In the end, principles of statutory construction have replaced principles of constitutional analysis in determining tax immunity. The Court thus has declined to extend tax

immunity or other forms of pre-emption under the Supremacy Clause any further than Congress itself provides. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (rejecting Indian tribe's argument that its off-reservation resort business should be exempt from state taxation) ("Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

Just as Congress defined the effect of the Supremacy Clause upon the legislation at issue in *Mescalero Tribe* and *Cipollone*, so too it has defined the scope of PCA immunity here. No reason exists to reconsider the immunities that Congress could have created but decided not to provide. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75-76 (1993); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 11-13 (1986). Yet this is precisely what the Eighth Circuit's interpretation of the "federal instrumentality" doctrine would do. This view should be rejected.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request the Court to reverse the lower-court decision.

Respectfully submitted,

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(10)

No. 95-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

State of Arkansas,

Petitioner,

v.

Farm Credit Services of Central Arkansas, PCA,
ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioner

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

In this age of reinventing government, it appears the use of government created or sponsored enterprises may be increased. *See* CREATING GOVERNMENT THAT WORKS BETTER & COSTS LESS—REPORT OF THE NATIONAL PERFORMANCE REVIEW, Chptr. 2, p.43, pp. 55-56 (Government Printing Office), 56-57 (General Services Administration), 57-58 (Center for Applied Financial Management of U.S. Department of the Treasury), 58 (National Oceanic and Atmospheric Administration), 60-61 (Federal Aviation Administration's air traffic control system), 64 (Conclusion) (GPO 1993). The purposes of this movement include the elimination of inefficient government sponsored monopolies that when transformed must compete with private business and the elimination of government red-tape that applies to public agencies. *Id.* at pp. 54-59, 60-62. Any increase in the use of government created or sponsored enterprises will create additional demands to know whether they are imbued with that aspect of sovereignty of the United States that entitles them to bypass state tax remedies and whether they enjoy a state tax exemption.

While Congress can be clear as to what its intent is about authorizing exceptions to the Tax Injunction Act, 28 U.S.C. §1341 (1994), and state tax exemptions, 49 U.S.C.A. §§24301(a)(3) and

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[1] This brief is filed pursuant to the consent of the parties.

24301(l) (Amtrak), 49 U.S.C.A. §11501(c) (railroad property), 49 U.S.C.A. §14502(c)(1) (motor carrier property), 12 U.S.C. §1452(e) and (f) (1994) (Federal Home Loan Mortgage Corporation), there are other times when Congress is not so clear. It is important to the States to have Congress be clear and specific about its intent to grant an exception to the Tax Injunction Act. Granting access to a federal district court on the basis of a single court's determination of alleged statutory ambiguity would undermine a cornerstone of "Our Federalism"—the minimizing of federal intrusion into sensitive state affairs without clear justification.

These issues concern the Multistate Tax Commission, because it was founded in response to increased interest in Congress in regulating state taxation, a reserved right of sovereignty of the States to operate effectively in their own sphere of influence. While Congress oftentimes has authority to regulate state taxation, its exercise of this authority may not be clear. When federal legislative proposals surface suggesting there may be some congressional interest in regulating state taxation, the Commission has sought to determine whether regulation of state taxation is, in fact, the intent of Congress. In addition to determining the actual legislative intent of the initiative that raises implications for state taxes, the Commission in these circumstances also seeks to inform Congress of the consequences of any intention to regulate state taxes.

This case falls within the concern of the Commission, as stated above, because Respondents' argument appears to be that Congress by

implication, and not by clear statement, has imbued production credit associations with that aspect of sovereignty of the United States that allows them to bypass state tax remedies. The Commission believes that adoption of Respondents' position would upset constitutional postulates and a fundamental declared policy of Congress that the Court has fully described in numerous cases. The Commission does not believe that in-roads should be made to "Our Federalism" on these thin circumstances. (Because the Commission views the Tax Injunction Act issue as quite important and dispositive of this case, the Commission is not directing its attention to the other issue in this matter—the determination of any congressionally established state tax exemption.)

Additionally, the Commission's interest in this case is to seek a robust reaffirmation of the strength of the Tax Injunction Act and its underlying policy. The Commission senses some possibility that not all federal courts share the Court's respect for the necessary dictates of our federal system.[2] The

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[2]This is not an unusual circumstance. The Tax Injunction Act itself was a legislative response to the failure of federal courts to respect the Court's admonitions in *Matthews* v. *Roger*, 284 U.S. 521 (1932). *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 128-129 (1981) (Brennan, J., concurring in judgment). The additional basis of the Commission's concern that is expressed in the text include the district court's summary treatment of this issue, below; *Northwest Airlines, Inc.* v. *Tennessee State Bd. of Equalization*, 11 F.3d 70 (6th Cir. 1993) (administrative fact finder's litigation position in another case that is opposite to taxpay-

Commission has a heightened interest in precluding the undercutting of the strong policy of the Tax Injunction Act, because States face any number of actions seeking to circumvent state tax remedies. Most recently, the Federal Communications Commission has noticed in the State of Oregon on the Petition of a third party that seeks to challenge that State's reference in its general property tax to the federal auction price paid by a personal communication service provider for its license. *Matter of Western PCS I Corporation*, Petition for Preemption and Motion for Declaratory Ruling, FCC File No. WTB/POL 96-3. This FCC action has occurred without regard to the policy of the Tax Injunction Act and to counterindicative statements of Congress. Section 601(c)(2) of the TELECOMMUNICATIONS ACT OF 1996, PUB. LAW 104-104 (1996), appearing as Historical and Statutory Note in 47 U.S.C.A. §152 (Supp. May 1996). In addition to preserving the strong policy of the Tax Injunction Act, a robust decision in this case will perhaps have the effect of preserving limited state resources that

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er's claim denies taxpayer a plain, speedy and efficient remedy); *Barringer* v. *Griffes*, 964 F.2d 1278 (2d Cir. 1992), *cert. denied*, 510 U.S. 1072 (1994) (notwithstanding *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338-39 (1990), court disregards representations of tax administrator as to availability of remedy and speculates on whether remedy is speculative); and *Direct Marketing Ass'n, Inc.* v. *Bennett*, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) (same).

are unfortunately expended defending state sovereignty from attacks that are more properly brought in state court.

In the end, the Commission's concern over bypassing state tax remedies is one of fairness. As has been observed previously with respect to the motivating factors for adoption of the Tax Injunction Act, Note, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?*, 45 WASH. & LEE L. REV. 381, 394 (1988), a separate system of justice for different classes of commerce inevitably creates disparities for similarly situated taxpayers, one segment of whom may have special access to remedies denied to others. Separate justice is not equal justice. The Commission seeks to avoid the adoption of a rule by the Court that will create the opportunity for this unfortunate aspect of federal district court intervention in state tax matters to occur with respect to financial instrumentalities that are competing in the same marketplace.

Your *amicus* finally notes that it is the administrative agency formed by the MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 751 (1994). Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems that followed the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1

and 23.[3] Twenty States have adopted the MULTISTATE TAX COMPACT through State legislation. Seventeen additional States have ratified the goals of the Commission by joining as associate member States.[4]

SUMMARY OF ARGUMENT

The decisions of the Court and other federal courts firmly establish that the Tax Injunction Act is a bar to subject matter jurisdiction of the federal district courts in a state tax challenge brought by a complainant within the terms of the proscription. A State may not waive this jurisdictional bar.

The Court has never before addressed whether a "federal instrumentality" may *unilaterally* bring a state tax challenge in federal district court. The proper rule for determining whether an enterprise chartered under federal law and nominally

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[3] The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

[4] The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Arizona, Connecticut, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

designated a federal instrumentality is free to avoid the restrictions of the Tax Injunction Act is whether the United States has joined in the state tax challenge or Congress has clearly stated that this instrumentality is not bound by the Act. Since the United States has affirmatively disavowed the position of Respondents, the only basis for the jurisdiction of the federal district courts in this case is a clear statement from Congress. Congress has not clearly stated that production credit associations should have access to federal district courts in state tax challenges.

The proposed clear statement rule properly delegates to Congress the obligation of determining whether it seeks to imbue the entities it authorizes to further federal policy with an important aspect of sovereignty of the United States. Providing federal court access to production credit associations would potentially irritate Federal/State relations. The political process of Congress is the proper arena to determine the friction points of "Our Federalism."

Moreover, production credit associations still maintain an adequate remedy for federal claims, because state courts are bound to enforce federal law and the Court is in a position to review any state court decision. On the other hand, if, for any reason, a state lacks an adequate remedy, the restriction of the Tax Injunction Act does not apply. In important cases, the United States can always join in the claim brought by the instrumentality to ensure a federal forum. The proposed rule also conforms to the Court's understanding that federally chartered corporations may not avoid the

restriction of the Eleventh Amendment by reason of their status.

The Complaint of Respondents must be dismissed for lack of jurisdiction of the federal district court to entertain the state tax challenge in this matter.

ARGUMENT

I. THE TAX INJUNCTION ACT ESTABLISHES A RULE OF SUBJECT MATTER JURISDICTION AND THE COURT MAY CONSIDER ITS APPLICATION REGARDLESS OF THE ARGUMENTS OF THE PARTIES.

Respondents' Brief in Response to the Brief for the United States as *Amicus Curiae* does not advance any argument disputing the United State's proposition that the Tax Injunction Act, 28 U.S.C. §1341 (1994), establishes a rule of subject matter jurisdiction. The mandatory language of the Tax Injunction Act and this Court's earlier statements certainly suggest this understanding. *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338-39 (1990) (limits jurisdiction); *California* v. *Grace Brethren Church*, 457 U.S. 393, 417, n.38 (1982) (limits jurisdiction/jurisdictional bar); *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, n.19 & 522 (1981) (transfer and limit of jurisdiction). Several federal courts have affirmatively held that the Tax Injunction Act establishes a subject matter jurisdictional bar, *e.g.*, *International Lotto Fund* v. *Virginia State Lottery Dept.*, 20 F.3rd 589 (4th Cir. 1996), and is non-waivable. *E.g.*, *Keleher* v. *New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2nd Cir. 1991). These

interpretations are consistent, as noted by the United States in its *amicus* brief on the petition at n.2, with the Court's dismissal in *Grace Brethren Church* notwithstanding California's attempted invocation of the jurisdiction of the federal district court.

II. THE TAX INJUNCTION ACT BARS RESPONDENTS' COMPLAINT IN THIS CASE, BECAUSE AN "INSTRUMENTALITY OF THE UNITED STATES" MAY NOT CHALLENGE STATE TAXES IN FEDERAL DISTRICT COURT UNLESS THE UNITED STATES HAS JOINED OR CONGRESS HAS CLEARLY STATED THAT INTENTION.

We understand the issues of this case to involve whether there is an implied right of access to federal district court (jurisdiction) and an implied state tax exemption (substance). The resolution of both issues flows from Respondents' status as "federal instrumentalities" that may indicate some level of implied sovereignty that is derivative of the United States.

The determination of each issue is apparently separate. *See Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 471 (1976). Yet, a finding of *implied* jurisdiction based on the entity's federal instrumentality status would not further much of a federal interest, if there is no *implied* exemption from state tax. It would be a strange result to have on the issue of jurisdiction a tolerant standard for imbuing a federal instrumentality with aspects of the sovereignty of the United States and to have on the issue of substance a more narrowly construed standard that

preserves "Our Federalism." These considerations lead us to believe it is relevant in resolving the jurisdictional issue to know what standard the Court applies to the substantive issue of when federal instrumentalities enjoy an implied exemption from state taxes.

Initially, we note that there are no decisions of this Court suggesting that a federal instrumentality may unilaterally bring an action challenging state taxes in federal district court. The holding of *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966), is limited to concluding that the Tax Injunction Act "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions."

In the absence of applicable precedent, the Court should adopt the rule that an instrumentality of the United States may not bring an independent, unilateral challenge to state taxes in federal district court, unless (i) the United States has joined the action to support the jurisdiction of the federal district court (a condition that cannot be met here); or (ii) Congress has clearly sanctioned the jurisdiction of the federal district court. The Court's adoption of this rule would be consistent with the constitutional postulates that animate the Tax Injunction Act itself and additional constitutional considerations. The rule proposed rejects the apparent approach of the federal district court in this matter: A federally chartered entity statutorily designated a federal instrumentality is, like the United States, not bound by the Tax Injunction Act.

There are several reasons for concluding that the proposed rule should be adopted.

The Court's recognition that the United States could bring a suit in federal court against a State without the State's consent followed as an inherent consequence of the constitutional plan. *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934). The United States is the embodiment of the national union whose very existence might well be threatened were the United States otherwise prohibited from taking this kind of action. Upon this observation and with the additional assistance of legislative purpose, the Court made two observations in *Department of Employment*: (i) the plain language of the Tax Injunction Act did not apply to the United States acting on behalf of itself and on behalf of its instrumentalities; and (ii) the United States, consistent with the Constitution, could bring its suit in federal court without the consent of the State. *Department of Employment*, 385 U.S. at 358. If the ability of the United States itself to call the tax system of a State to task in federal court is dependent upon these imposing considerations, we submit like considerations *and more* must apply to the designated instrumentality of the United States.

A federally chartered entity that is a federal instrumentality is not by that status the United States itself. *See Federal Reserve Bank of Boston* v. *Commissioner of Corporations and Taxation*, 499 F.2d 60, 62-63 (1st Cir. 1974) (An acknowledged federal instrumentality playing slight governmental role must secure participation of the United States

to support federal district court jurisdiction in state tax challenge.); *cf. United States* v. *New Mexico*, 455 U.S. 720, 735-37 (1982) (A state tax exemption is based upon the inseparability of the United States and the agency's or instrumentality's activities or upon the taxpayer standing in the shoes of the Federal Government. A federal instrumentality is "virtually an arm of the Government," "integral parts of [a governmental department]," or "arms of the Government deemed by it essential for the performance of governmental functions." Quoting other cases.)

If a federally chartered instrumentality necessarily is an entity different from the United States, it is reasonable to require as a condition precedent to the bringing of a state tax challenge in federal district court the establishment of one of two things: (i) a clear statement of Congress that it intends to extend the sovereign right of the United States to bypass state tax remedies; or (ii) the joinder of the United States itself. In either case, the United States by its official action has assented to federal court involvement into one of the most sensitive aspects of the federal union, the internal fiscal affairs of individual States.[5] *E.g.*, *Fair Assessment in Real*

[5] Of course, there may be some limit on the ability of the United States to grant access to federal district court in all cases. *See Smith* v. *Reeves*, 178 U.S. 436, 446 (1900) (federally chartered entity is not by that status free to ignore Eleventh Amendment) and *Seminole Tribe of Florida* v. *Florida*, ___ U.S. ___, ___, 116 S.Ct. 1114, 1131-32 (1996) (the power of Congress under the Commerce Clause is subject to Eleventh Amendment).

Estate Association v. *McNary*, 454 U.S. 100, 102-103, 108-109 (1981). In the absence of these indicia, there is no basis for determining that the United States itself will be harmed by denying a federal instrumentality access to federal district court for its state tax challenge. (Because there is no possibility of the United States joining Respondents in this case, the remaining argument will focus primarily on the need for a clear statement from Congress to support the jurisdiction of the federal district court in this case.)

Some may claim that it is inappropriate to impose the clear statement rule with respect to federal instrumentalities, because this places legitimate governmental activities at an additional risk that does not apply to the Federal Government. The traditional rule that applies to the ability of the Federal Government to sue the States, including the bringing of a suit in federal district court, is that no restraint will be recognized except in the presence of a clear statement of that intent by Congress. *E.g.*, *United States* v. *Broward County, Florida*, 901 F.2d 1005, 1008 (11th Cir. 1990), applying *Hancock* v. *Train*, 426 U.S. 167, 179 (1976). To restrict some federal instrumentalities from access to federal district court, the argument might continue, is to suggest these instrumentalities are somehow not in furtherance of the governmental interests of the

The interaction of these cases seems to suggest there is constitutional content to determining what kinds of entities authorized or created by Congress are synonymous with the United States for purposes of bypassing state tax remedies.

United States, a proposition inconsistent with *Federal Land Bank of Wichita* v. *Board of County Commissioners*, 368 U.S. 146, 150-151, n.15 (1961).

There are many reasons why this simplistic approach of automatically granting federal instrumentalities the same sovereign rights of the United States should not apply to state tax challenges, a matter affecting a fundamental aspect of the States' reserved sovereignty. *See Dows* v. *Chicago*, 78 U.S. (11 Wall) 108, 110 (1871). The requirement of a clear statement from Congress is still the appropriate rule.

First, recognition of the clear statement rule in this context is a logical extension of the same requirement that the Court places on congressional enactments that seek to override the Eleventh Amendment. *Seminole Tribe of Florida* v. *Florida*, ___ U.S. ___, ___, 116 S.Ct. 1114, 1131-32 (1996). Unless the Court is prepared to embrace the rule that all federal instrumentalities by virtue of that status alone may bypass state remedies in challenges of state taxes, the clear statement rule merely ensures that Congress in employing an instrumentality to further some federal policy actually intends to affect sensitive Federal-State relations. As noted previously, the current consideration given to reengineering government, p. 1, *supra*, creates a need to inform Congress that authorizing the bypass of the Tax Injunction Act requires a clear statement of that intent.

Second, placing the non-onerous requirement of the clear statement rule on Congress recognizes the

paramount responsibility of Congress to determine the friction points of our federal system in its political process. *Cf. United States* v. *New Mexico*, *supra*, 455 U.S. at 737-38, (Absent congressional direction, state tax power can be denied only under clearest constitutional mandate.). With no substantial benefit flowing to the Federal Government from a rule granting automatic federal district court access for state tax challenges of all federal instrumentalities, it is unreasonable to suggest the preservation of the national union is implicated in the clear statement rule. Unless Congress has authoritatively spoken, therefore, the Court should not embrace a rule that will incur the substantial detriment of exposing state fiscal affairs to the intrusion of a single federal judge's examination. *See Perez* v. *Ledesma*, 401 U.S. 82, 93, 108-110 (1971) (Brennan, J., concurring in part and dissenting in part) (Three-Judge Court Act with its direct appeal provision responded to concerns over single federal judge reviewing the constitutionality of State law.).

Third, the absence of jurisdiction in the federal district courts is not a denial of a legal or equitable remedy to the instrumentality's federal claim. State remedies exist to respond to the claims. Federal law remains supreme in the state adjudication of federal matters arising under state law. *See Testa* v. *Katt*, 330 U.S. 386, 390-91 (1947). There is no assumption that federal courts are any more competent or efficient preservers of federal concerns. *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 431 (1982); *Stone* v.

Powell, 428 U.S. 465, 494 n.35 (1976). In any event, the Court may review any state court decision that may be rendered.

Fourth, a failsafe procedure is available to ensure that *any* legitimate federal instrumentality can always gain access to federal district court, if its state tax challenge truly raises issues affecting the governmental interests of the United States. There should be little opportunity to object to a state tax challenge brought in federal district court by the federal instrumentality *if the United States joins*.

Fifth, in the truly extraordinary case, an unprotected federal instrumentality may still gain access to federal court, if the state remedy is not "plain, speedy and efficient." 28 U.S.C. §1341 (1994). This access to federal district court in state tax matters invokes the doctrine of Ex Parte *Young*, 209 U.S. 123 (1908).

Sixth, the adoption of the rule that Congress must clearly speak to provide access to federal district court in state tax challenges brought by a federal instrumentality conforms to the Court's earlier recognition that a corporation chartered pursuant to federal law is not entitled by that status to circumvent the restrictions of the Eleventh Amendment. *Smith* v. *Reeves*, 178 U.S. 436, 440 (1900). This ruling in practical effect indicates that the mere congressional blessing of the activities undertaken by an entity pursuant to its federal charter does not support a conclusion that the entity and the United States are so closely entwined to make them inseparable. There must be substance to the determination that a federal instrumentality

is imbued with the sovereignty of the United States. A clear statement by Congress of its intent in establishing or authorizing the formation of an instrumentality adds the missing substance.

These considerations justify and support the policy that it is better for the affected sovereign (the State) whose laws are being challenged to be given the first opportunity to evaluate and lend its expertise with the affected local law to the resolution of the dispute. *Cf. National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

If the appropriate standard is that Congress must speak clearly, then attention must be given to whether Congress has so spoken in this case. We believe the current statutory circumstances of production credit associations are little more than a declaration that these associations may be chartered under federal law. The legislation surrounding production credit associations does not suggest a condition of inseparability.

Although the federal statutes clearly label production credit associations as federal instrumentalities, the designation is limited in effect. The declaration in 12 U.S.C. §2071(a) (1994) is that each production credit association continues "as a Federally chartered instrumentality of the United States." The clear implication of §2071(a) is that instrumentality status given is dependent upon its Federal charter—something akin to the status of national banks that the Court has called indisputable "tax-immune instrumentalities of the United States." *Department of Employment*, *supra*,

385 U.S. at 358. But no one is so bold to suggest that a national bank's instrumentality status would render the Tax Injunction Act inapplicable. *Federal Reserve Bank of Boston*, *supra*, 499 F.2d at 62-63 (1st Cir. 1974); *Dominion National Bank* v. *Olsen*, 771 F.2d 108, 112 (6th Cir. 1985) (existence of plain, speedy and efficient remedy would preclude federal court action brought by national banks).

The other declaration of federal instrumentality status, 12 U.S.C. §2077 (1994), is similarly restricted. Section 2077 declares each production credit association and its obligations "instrumentalities of the United States." This declaration is limited in effect by thereafter noting that "as such" the notes, debentures, and other obligations issued by the associations shall enjoy a tax exemption that is expressly defined. The statute recites no other benefit flowing from the declared status of a federal instrumentality. Section 2077's use of language that explains the consequences of instrumentality status is consistent with the Court's advice in *United States* v. *New Mexico*, *supra*, published approximately three years before the 1985 technical amendments to §2077.

Congress stated in both of the cited sections what it meant by stating that a production credit association is a federal instrumentality. It would violate the Court's concern for preserving the sovereignty of the States as constituent members of our federal system to take these declarations as clear evidence that Congress intended production credit associations to have direct access to the federal district courts in state tax challenges.

We do not believe the conclusion that there is no clear statement from Congress of its intent to allow production credit associations access to federal court is inconsistent with either the Court's determination in *Moe*, *supra*, or *Federal Reserve Bank of Boston*, *supra*. We read both of those cases to be a circumstance where the deciding court rested heavily upon the determination that Congress had spoken to establish access to federal district court.

Parenthetically, we note also that there is no support for contending that Congress has generally announced an intent that a declared federal instrumentality, *qua* instrumentality, is automatically entitled to assume the shoes of the United States for purposes of avoiding the Tax Injunction Act. Congress appears to be quite sensitive to declaring when it wants federal access for entities established by congressional action or third parties. *See* federal statutes cited at pp. 1-2, *supra*. Denying federal district court access when Congress has not clearly stated that intention avoids allowing instrumentalities not "integral parts of [a governmental department]," or "arms of the Government deemed by it essential for the performance of governmental functions," *United States* v. *New Mexico*, *supra*, 455 U.S. at 737, quoting *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942), to benefit from the sovereignty of the United States under pretense.

While the rule of presuming the United States is free of the restrictions of the Tax Injunction Act without a clear congressional statement to the contrary befits the actual sovereign, the application of

the rule in these circumstances is without justification. We note in this regard the searching analysis that the Court applied in determining whether the sovereign immunity of the States was transferred to a port authority, an entity created by the action of two States and the United States. *Hess* v. *Port Authority Trans-Hudson Corporation*, ___ U.S. ___, 115 S.Ct. 394 (1994). While not directly applicable to these circumstances, this case illustrates the sensitivity the Court exhibits before recognizing instrumentalities are imbued with the sovereignty of their governmental creators. The only appropriate rule is to require that either Congress clearly state its intention to imbue its instrumentalities with its sovereign status or alternatively the joinder of the United States. In neither case is the sovereign interest of the United States significantly impaired.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court entertain the issue of whether the Respondents may unilaterally bring a state tax challenge in federal district court, that the Court adopt a rule that a "federal instrumentality" may not, consistent with the Tax Injunction Act, unilaterally bring a state tax challenge in federal district court without a clear statement from Congress that it intends its instrumentality so to be imbued with the sovereignty of the United States, and that the

Court remand this matter with instructions to dismiss the Complaint of Respondents for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED,

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February 25, 1997

No. 95-1918

(12)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF ARKANSAS,

Petitioner,

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA;
FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA;
EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION;
and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND NEBRASKA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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24 pp

QUESTION PRESENTED

Whether privately owned, nontaxpayer-funded, profit-making production credit associations should be considered constitutionally immune from state sales and income tax as instrumentalities of the federal government.

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The American Bankers Association and Nebraska Bankers Association hereby respectfully submit this brief as

amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.3 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the principal trade association of the banking industry in the United States, representing banks in each of the fifty states and the District of Columbia, including both national and state-chartered banks. The Association membership includes community, regional, and money center banks, bank holding companies, as well as savings associations, trust companies and savings banks, with combined assets totalling over ninety percent of all banking assets in the United States.

The Nebraska Bankers Association is a trade association with 324 of the 327 banks in Nebraska among its membership. A significant portion of the loan portfolios of Nebraska banks consist of agricultural loans. The tax immunity granted to production credit associations under the lower court ruling provide a significant competitive advantage to the detriment of Nebraska banks.

The decision of the Eighth Circuit conferring a blanket state sales and income tax immunity on production credit associations raises fundamental legal and public policy tax issues of substantial importance to the banking industry, agricultural banks in particular. Production credit associations are direct retail lenders, no longer owned by the United States government, and serve no governmental role

or function warranting a judicially created exemption from state and local taxation. Yet, the Eighth Circuit relied upon a production credit association's classification as a "federal instrumentality," absent any review of Congressional intent or factual analysis of a production credit association's governmental powers. Such a rigid interpretation of intergovernmental immunity is untenable and would have a profound impact on the banking industry.

Your amici believe that the views of the banking industry will assist the Court in deciding the merits of this case. By judicially creating immunity in this case, the unique competitive advantages that currently exist for Farm Credit System lending institutions would be unnecessarily strengthened at the expense of other similarly-situated privately owned commercial banks. Undeniably, production credit associations are private, commercial, profit-generating, retail institutions. As such, these associations should legally assume their fair share of responsibility for the cost of state governments, whose benefits they receive and whose protections they enjoy.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of 12 U.S.C. Section 2077, and the extent to which privately owned, profitable, production credit associations should benefit from a constitutional immunity from state taxation. Section 2077 provides an exemption from all taxation on notes, debentures, and obligations issued by production credit associations. Prior to the Farm Credit Amendments Act of 1985, a production credit association's tax exemption

was contingent upon a continued proprietary interest by the United States government. The United States divested ownership in all production credit associations as of 1968. Since that time, production credit associations have been subject to applicable nondiscriminatory state and local taxes.

Consistent with principles of statutory construction, the Court should review the language, structure, and legislative history of the Farm Credit Act, and all relevant facts, and set appropriate limits on state taxation. Based upon these factors, it is clear that it was not the intent of Congress to provide a blanket exemption from state sales and income taxes for production credit associations throughout the United States. A Congressional Committee report described the removal of language relevant to this case as merely a technical amendment.[1] Further, the nondiscriminatory tax involved in this case applies to national banks, which have equal claim to federal instrumentality status. Obviously, the taxes are not, in that case, thought to obstruct or burden any federal function. There is no reason to think any differently in the case of production credit associations. Production credit associations possess many of the purposes and engage in essentially the same activities as private commercial banking or savings institutions. Absent a clear Congressional waiver from state sales and income taxation, no public policy interests exist to justify the creation of a judicial blanket exemption from state and local taxation. Finally, should the Court uphold the

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[1] House Rep. No. 92-593, 92nd Congress, 1st Sess. 2, *reprinted in* [1971] U.S. Code Cong. & Admin. News 2091, 2098.

decision of the Eighth Circuit, the competitiveness of the agricultural lending market would be threatened, and the desire of Congress to transform the Farm Credit System from a government-owned to a privately-owned and controlled system would be compromised.[2]

ARGUMENT

I. THE DECISION OF THE EIGHTH CIRCUIT MISCONSTRUES CONGRESSIONAL INTENT CONCERNING THE PROPER INTERPRETATION OF 12 U.S.C. SECTION 2077.

Production credit associations were created pursuant to the Farm Credit Act of 1933, to provide loans to farmers and ranchers. 12 U.S.C. Section 2071. Similar to other lending institutions in the Farm Credit System, production credit associations are statutorily classified as a "federal instrumentality." 12 U.S.C. Sections 1271(a), 1271(b)(7). Production credit associations are a vital component of a powerful nationwide network of lending institutions and financial entities within the Farm Credit System.[3]

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[2] House Rep. No. 287, 86th Congress 1st Sess. 1, *reprinted in* [1959] U.S. Code Cong. & Admin. News 2123.

[3] The Farm Credit System was initially created in 1916 pursuant to the Federal Farm Loan Act, Pub. L. No. 64-158, 39 Stat. 360 (1916). According to the Farm Credit Administration Quarterly Report for the quarter ending September 30, 1996, as of January 1, 1997, the Farm Credit System is currently comprised of 6 Farm Credit Banks, 1 Agricultural Credit Bank, 1 Bank for Cooperatives, and 217

In the Farm Credit Act of 1971, Congress made significant changes to the existing Farm Credit Act, including a number of revisions concerning the operation and structure of the Farm Credit System. At that time, Congress retained certain tax exemption provisions affecting production credit associations.[4] Within the Farm Credit Act of 1971, the tax provisions (relating to notes, debentures, or other obligations) for production credit associations read as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United

associations representing 65 Production Credit Associations, 60 Federal Land Bank Associations, 61 Agricultural Credit Associations, and 31 Federal Land Credit Associations.

[4] Farm Credit Act of 1971, Pub. L. 92-181, § 2.17, 85 Stat. 583, 602 (1971), (formerly designated 12 U.S.C. § 2098 and now codified in 12 U.S.C. § 2077). This section remained essentially the same as the Farm Credit Act of 1933 as it relates to the provision for exemption from Federal, State and local taxation for notes, debentures, or other obligations issued by production credit associations, (except surtaxes, estate, inheritance and gift taxes) and the United States stock ownership contingency associated with the waiver from Federal, state and local income taxation.

> States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now and hereafter imposed by the United States or any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C 742(a)) and except that any real and personal property of such associations shall be subject to federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.*

The last two italicized sentences of the preceding paragraph were deleted during technical and conforming amendments to the Farm Credit Amendments Act in 1985.[5]

[5] The Farm Credit Amendments Act of 1985, Pub. L. No. 99-205 (1985), made a number of technical changes to the powers and duties of the Farm Credit Administration. The most important and relevant change was the replacement of the Governor of the Farm Credit Administration with a three member board.

Nothing in the legislative history of this Act indicates an intent by Congress purposefully to remove the long-standing waiver of immunity. This is particularly true given the fact that by 1968, the United States did not own any stock interest in production credit associations. Accordingly, for almost thirty years, cooperatively owned production credit associations have not enjoyed statutory or constitutional immunity from state and local taxation.[6] Congressional activity relating to the deletion of the contingency language in 12 U.S.C. Section 2077 in 1985 should not, therefore, be translated into a Congressional intention to provide a broad tax immunity specific to production credit associations.

In an attempt to develop standards for determining Congressional intent in this conflicting area of constitutional immunity, the Court recognized that "[w]ise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy." *United States v. Detroit*, 355 U.S. 466, 474 (1958). Also, in *Helvering v. Gerhardt*, 304 U.S. 405, 411-12, n. 1 (1938), Chief Justice Stone noted that "[s]ince the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it

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[6] It should be noted that previous attempts by production credit associations in claims of immunity from state taxation were unsuccessful. *Woodland Production Credit Association v. Franchise Tax Board*, 37 Cal. Rptr. 231 (1964); *Columbus Production Credit Association v. Bowers*, 180 N.E. 2d 1 (Ohio), *cert. denied*, 371 U.S. 826 (1962).

from State taxation. Congress may curtail an immunity which might otherwise be implied...or enlarge it beyond the point where, Congress being silent, the Court would set the limits." It hardly seems plausible that Congress, by its silence, intended to enlarge the scope of immunity for production credit associations in 12 U.S.C. Section 2077. The Court should, in this case, set appropriate state taxation limits and reexamine the Eighth Circuit's egregious misapplication of Congressional intent.

II. THE TAX INVOLVED IN THIS CASE FALLS NEITHER ON THE FEDERAL GOVERNMENT NOR ITS LAWFUL INSTRUMENTALITIES.

The Eighth Circuit held that no statutory provision exists, including 12 U.S.C. Section 2077, that indicates an intent on the part of Congress to waive tax immunity of production credit associations as federal instrumentalities. This reasoning is abstruse, as the decision implies that the Arkansas income and sales tax on profitable, privately owned retail institutions is an invalid encroachment of the constitutional tax immunity accorded the Federal Government. No practical reasons exist to provide a prohibition of nondiscriminatory state sales and income taxes on production credit associations serving no governmental function, other than to fulfill Congressionally mandated policy objectives.

Black's Law Dictionary defines a federal instrumentality as "A means or agency used by the federal government. A government agency immune from state

control."[7] Under this definition, modern production credit associations can hardly be considered as used by the federal government. Further, the associations' structure, activities, and operations do not warrant being classified as a government agency.

A history of the state taxation of national banks illustrates the application of the tax immunity to federal instrumentalities used by the federal government. While state-chartered banks have usually been subject to state taxation, national banks were considered constitutionally immune from some forms of state taxation due to the unique role and function they once served. The landmark case of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 406 (1819), established an implied constitutional tax immunity in a case involving a discriminatory tax assessed against the Second Bank of the United States. Unlike today's national banks and production credit associations, however, the Second National Bank of the United States in *M'Culloch* was owned and controlled by the United States government. In addition, the Court was placed in an unenviable position of establishing judicial policy when the United States, "having only tiny revenues of less than $25 million, was quite weak in comparison with the relatively strong state governments."[8]

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[7] *Blacks Law Dictionary* (5th ed. 1983).

[8] Paul J. Hartman, *Federal Limitations on State and Local Taxation* 247 (1981).

Over the years, however, the notion of banks as federal instrumentalities of the federal government and created for a public purpose has eroded, even though the intergovernmental tax immunity doctrine, applied to a national bank as a federal instrumentality, was upheld in *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968). In holding that states are without power to tax national banks, unless authorized by Congress, the Court in *First Agriculture National Bank*, stated:

> Because of pertinent legislation in the banking field, we find it unnecessary to reach the constitutional question of whether national banks should be considered nontaxable as federal instrumentalities.[9]

Unlike the Eighth Circuit's decision in this case, the Court in *First Agricultural* performed an analysis of Congressional intent, finding that Congress intended to prescribe only four types of permissible taxes as outlined in the federal statute.[10] In an eloquent dissent, Justice Marshall stated, "I think that in light of the present functions and role of

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[9] *Id.* at 341.

[10] At the time of the *First Agricultural* case, a 1926 amendment of § 5219 of the Revised Statutes was in effect, which permitted States to levy four specific types of taxes on national banks. The taxes were on (i) national bank shares, (ii) dividends in the hands of the shareholders, (iii) income of banks, and (iv) taxes according to or measured by the bank's income. A bank's real property was subject to tax.

national banks, they should not, in this day and age be considered constitutionally immune from nondiscriminatory state taxation...."[11] Recognizing that banks fail to possess any unique quality giving them the character of a federal instrumentality, Congress later responded and provided an explicit waiver of immunity from state and Federal taxation of national banks in 1973.[12]

In determining whether a private entity should be treated as immune from state taxation, courts must perform an analysis of the entity asserting federal instrumentality status. A similar analysis should be performed for production credit associations. In *Department of Employment v. United States*, 85 U.S. 355 1966, the Court conferred federal instrumentality status on the Red Cross, even though it is a private entity, reasoning that the statute and Executive Order "devolved upon the Red Cross...a wide variety of functions indispensable to the workings of our Armed Forces" and "assisting the Federal government in providing disaster assistance to the States in time of need." Sound legal analysis concerning the activities, structure, control, and ownership by the federal government were similarly performed in other cases before the Court.[13] If such an examination were performed by the Eighth Circuit

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[11] *Id.* at 349.

[12] *See* Section 5219, Revised Statutes, 12 U.S.C. § 548.

[13] *See Graves v. New York*, 306 U.S. 466 (1939); *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

in this case, a different result would most likely have been reached. Congressional silence should not present an opportunity to the courts to create an immunity from state sales and income tax to the detriment of similarly situated commercial lenders who offer similar loan products and services.

The tax status of cooperatively-owned federal credit unions is an important contrast to the varied applications of constitutional immunity extended to federal instrumentalities. Federal credit unions are granted a specific immunity from federal and state taxation in 12 U.S.C. Section 1768, without a corresponding Congressional designation as a federal instrumentality. Such a contrast is significant because national bank lenders, federal credit unions, and production credit associations are similarly situated financial institutions, albeit serving their own statutorily created public purposes.[14] Unlike production credit associations, however, the waiver from taxation for federal credit unions is clear and specific. Indeed, the Internal Revenue Service considers federal credit unions as instrumentalities of the federal government.[15] However, if the specific waiver

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[14] Under 12 U.S.C. § 1752(1), a federal credit union is defined as "a cooperative association organized in accordance with the provisions of this chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes."

[15] Rev. Rul. 69-283; 1969 C.B. 156 (Federal credit unions are recognized as U.S. instrumentalities by the I.R.S. and are considered exempt under § 501(c)(1) of the Code. However, since they are not wholly owned by the U.S.,

language in 12 U.S.C. Section 1768 were inadvertently removed by Congress, it is uncertain, based upon the reasoning of the Eighth Circuit, whether federal credit unions would be entitled to a blanket exemption from state and local taxation as a federal instrumentality. Production credit associations, as statutorily declared federal instrumentalities, should not receive preferential treatment.

III. The Eighth Circuit Decision on The Tax Status of Production Credit Associations Would Adversely Impact The Commercial Agricultural Banking Industry.

The structure and operations of the Farm Credit System are strikingly similar to the current commercial bank system in the areas of examination, enforcement, capital and compliance requirements, and regulatory powers. The Farm Credit System consists of: (1) the Farm Credit Administration, which is a primary federal regulator that examines and supervises all System institutions, (2) the Farm Credit System Insurance Corporation, which insures the principal and interest on the system's debt securities, and (3) the Federal Farm Credit Banks Funding Corporation, which manages the sale of debt securities. The system also includes regional farm credit banks, 225 Farm Credit System lending institutions, and the Bank for Cooperatives.

Unlike government sponsored entities, such as the Federal National Mortgage Association, the Federal Home

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credit unions must file a Form 990 Annual Information Return).

Loan Mortgage Corporation, the Federal Home Loan Bank System, and the Student Loan Marketing Association, production credit associations are direct retail lenders and fierce competitors of commercial banks. The Farm Credit System's 1995 Quarterly Financial Report reported year-end total assets of $71.4 billion. Its institutions earned $1.2 billion in 1995, outperforming commercial farm banks on average return on assets and the percentage increase of total loans and assets. Yet, the most meaningful entries contained in the financial reports are the provisions for state, local, and federal income taxes. For 1995, lending institutions in the Farm Credit System paid approximately $137.4 million in taxes. Respondents' claim of immunity from taxation, therefore, has economic and competitive consequences that greatly outweigh any valid claim for constitutional immunity as a federal instrumentality.

On January 9, 1997, the Farm Credit Administration issued final regulations expanding the scope and eligibility of its lending operations.[16] During the official comment period, commercial banks expressed concerns relating to the appropriate role of government sponsored entities, such as the Farm Credit System. The Farm Credit Administration noted that "the presence of the System promotes competitive behavior among other lenders that serve these markets and contributes to the preservation of a well functioning capital market for agricultural and rural credit needs." Recognizing the Farm Credit System's limited relationship to the federal government, the Farm Credit Administration stated:

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[16] 12 C.F.R. Parts 613, 614, 615, 618, 619, 620, and 626; 62 Federal Register 4429 (January 30, 1997).

> The comment letters reveal a widespread misunderstanding about the System's purpose and relationship to the Federal government and to the public. Contrary to the belief of many commentators, the Farm Credit System is not a taxpayer-funded, government loan program. The Federal government: (1) Holds no capital stock in FCS institutions; (2) appoints no members to the boards of directors of any FCS bank or association; and (3) appropriates no funds to the System. Rather, FCS banks and associations are cooperatives that are owned and controlled by their member-borrowers.[17]

In an attempt to clarify certain misconceptions concerning the System's debt and the tax status of its institutions, the Farm Credit Administration also noted that those of its institutions (including production credit associations) holding 63 percent of total Farm Credit System assets are subject to federal taxation.[18] Unlike commercial banks, which rely on deposits for a primary source of funding, Farm Credit Banks issue Systemwide Debt Securities through the Federal Farm Credit Banks Funding Corporation. The system provides a low-cost source of

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[17] *Id.* at 4435.

[18] *Id.* at 4435. Data is as of September 30, 1996. The remaining 37 percent of assets are held by other forms of institutions within the Farm Credit System (not including PCAs) that are exempt from federal taxation.

borrowed funds for production credit associations and creates a substantial competitive advantage over commercial banks offering similar services. However, production credit associations, at least for purposes of risk and liabilities associated with the these securities, are not considered instrumentalities of the federal government.[19]

The most profound effect of the Eighth Circuit's decision is the probable economic hardship such a blanket tax immunity would have on competitors of the production credit associations, including banks represented by your amicus. If the decision in the Eighth Circuit were upheld, the costs of conducting a production credit association's retail lending business would be dramatically decreased. It logically follows that any legislative or judicial removal of any provision for taxes, without any corresponding public policy or compelling legal reason, would allow production credit associations to offer much lower rates on their short and intermediate-term loans and, in turn, provide their private owners with a significant return on their investments to the detriment of similarly situated taxpaying banks and their shareholders.

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[19] The Federal Farm Credit Banks Funding Corporation provides the following disclaimer to investors: "Systemwide Debt Securities are the joint and several liability of the banks and are not obligations, nor are they guaranteed by, the United States or any agency or instrumentality thereof, other than the banks." *Annual Information Statement-1994: Federal Farm Credit Banks Funding Corporation* at 14 (1995).

CONCLUSION

There are no compelling legal justifications for conferring state sales and income tax immunity on production credit associations. For the reasons cited above, the decision in the Eighth Circuit should be reversed.

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